

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 14, 2006 Session

STATE OF TENNESSEE v. MATTHEW CARFI

**Direct Appeal from the Sumner County Criminal Court
No. 319-2002 Jane W. Wheatcraft, Judge**

No. M2005-01467-CCA-R3-CD - Filed September 29, 2006

The Defendant, Matthew Carfi, was convicted of official misconduct, aggravated assault, and aggravated burglary. The Defendant was sentenced to an effective sentence of fifteen years in prison as a Range I offender. On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion to exclude testimony about the Defendant's prior bad acts; (2) the trial court erred when it rejected the Defendant's application for pre-trial diversion; (3) the trial court erred when it rejected the Defendant's claim that the State had to elect between the offenses of especially aggravated burglary and aggravated assault; (4) Tennessee Code Annotated section 39-14-402 (2003) is unconstitutional in that it fails to give notice of prohibited conduct; (5) the trial court erred when it allowed the prosecution to amend the indictment; (6) the evidence presented at trial is insufficient to support the Defendant's convictions; (7) that the trial court erred when it allowed the State to introduce evidence at trial despite the fact that the State failed to comply with Tennessee Rule of Criminal Procedure 16(a)(1)(c); (8) the trial court erred when it allowed entire pre-trial statements into the evidence; (9) the trial court improperly allowed hearsay testimony into the evidence; (10) the trial court allowed the State to present an improper closing argument; (11) the trial court erred when it failed to require the State to elect for which co-defendant's commission of aggravated assault the Defendant was being held responsible; and (12) the trial court erred when it sentenced the Defendant. After thoroughly reviewing the record and applicable authorities, we affirm the Defendant's convictions. We, however, conclude that the trial court committed reversible error when sentencing the Defendant, and we remand the case for a new sentencing hearing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part,
Reversed in Part and Remanded**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which DAVID G. HAYES, and JOHN EVERETT WILLIAMS, JJ., joined.

Robert Louis Jolley, Jr., Knoxville, Tennessee, for the Appellant, Matthew Carfi.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Ray Whitley, District Attorney General; and Thomas Dean, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from an attack on, and entry into the home of, Danny Watts. At the Defendant's trial for resulting assault and burglary charges, the following evidence was presented: Kenneth Stripling described how he had met the Defendant at Latham's BP, a gas station, where Stripling spent a lot of time at a picnic table looking at magazines and enjoying beverages. He testified that he chatted with the Defendant, and they became friends. Stripling knew the Defendant was a police officer when he met him because the Defendant wore a police uniform, drove a police car, and had a gun and a badge. Stripling said that he met a man named Michael Dunaway through the Defendant, and he, the Defendant, and Dunaway had sat at the Latham's BP picnic table together and talked a couple of times. Dunaway told Stripling that he was a Sumner County Drug Task Force officer. Stripling testified that, one time when he was at the Latham's BP with the Defendant and Dunaway, the Defendant described how Watts had grabbed a purse from the wife of a police officer named Chris Litton.

Stripling testified that he was married to, but separated from, Danny Watts's half-sister. He said that he was furious with Watts because he had heard that Watts was telling people that Stripling and his brother were selling cocaine. Stripling testified that the Defendant called him at work and told him that Watts had gotten into trouble and told the police that Stripling was a cocaine dealer, and the police had created a file on Stripling. Stripling testified that Dunaway had also previously said that Watts accused Stripling of selling cocaine. Stripling said that, after he received this phone call, he went over to the Defendant's house with his brother to discuss Watts's statements. Stripling testified that he did not care about the incident between Watts and Officer Litton's wife, but he was mad that Watts had alleged that Stripling sold cocaine.

Stripling testified that he told the others that he was going to go to Watts's house and beat him, but they told him not to go because then everyone would know that the Defendant told Stripling about Watts's actions. Stripling thought that he could talk to the Defendant, a police officer, about beating up someone because the Defendant was his friend. Stripling said Dunaway offered to, and the Defendant agreed that they should, ask a man named David Pipkin from out of town, to beat up Watts. Stripling explained that this scheme would ensure that the Defendant would not get in trouble for Watts's beating. He further testified that they ultimately decided to go to Watts's house with Pipkin, push Watts out the front door, and beat him while they were wearing masks. Stripling explained that Pipkin was supposed to grab Watts and throw him out into the front yard, and then Stripling and Dunaway would beat Watts while the Defendant used the Defendant's police radio to ensure that no one called the police.

Stripling said that, on the day of the alleged crime, the Defendant called him and told him to come to Applebee's because Pipkin was in the area. Stripling testified that he grabbed \$200 to pay Pipkin for his involvement, two closet rods, some masks, and his gloves, and then he left for Applebee's. He described the closet rods, or sticks, that he grabbed as about thirty inches long and

an inch-and-a-half thick. Stripling identified a rod and a radio that were similar to the ones used on the night of the alleged crime. When Stripling arrived at Applebee's, he saw the Defendant, Dunaway, and Pipkin, and they all drank at Applebee's for an hour or an hour and a half. During this time, they met an intoxicated woman who was fighting with her husband, and this woman later left Applebee's with Pipkin and Dunaway. Stripling said that he did not see the other members of his group talk to anyone else besides the bartender. He recalled that they were all joking about what they were about to do and that the Defendant called him "Deputy Stripling," a name he had called him on previous occasions. Stripling testified that they left Applebee's and that he and the Defendant got into the Defendant's car, and he put the rods, masks, and gloves in the Defendant's car beside the Defendant's walkie-talkie radio that had a CB handle. Stripling had seen the Defendant with such a radio previously when the Defendant was in his police uniform. Stripling thought that they took his car to the Latham's BP before leaving for Watts's house. He testified that they drove to Watts's neighborhood and that Dunaway, Pipkin, and the intoxicated lady drove to the neighborhood in a separate vehicle. Stripling recalled that the Defendant, who was not in uniform, took his walkie-talkie radio and got into a vehicle with Dunaway, Pipkin, and the intoxicated woman.

Stripling described how he, Pipkin, and Dunaway walked to Watts's house, Pipkin went to the front door, and he and Dunaway stood by the sides of Watts's porch. Stripling recalled that, Pipkin could not get Watts to open the door so he asked Watts to borrow his phone. Pipkin pretended to make a phone call and then gave the phone back to Watts. Stripling said that Dunaway then went to the front door of Watts's house and told Watts that he had run out of gas and that he would pay Watts twenty dollars to take him to the gas station. He said that Dunaway entered Watts's house using the front door and that he and Pipkin then went around the side of the house. Stripling described how Dunaway pushed Watts out the back door, and they beat Watts. Stripling recalled that he broke a closet rod across Watts's head, and Watts fell backwards, and then he got on top of Watts and punched him. He described the beating as "pretty brutal." He said that Watts got thrown against Watts's car, the car alarm went off, they kicked Watts a couple of times, and then ran to their cars and drove away. Stripling testified that Dunaway threw the rods and masks into the Defendant's car.

Stripling testified that, after leaving Watts's neighborhood, he and the Defendant went to Latham's BP where Stripling had left his car. He gave the Defendant \$200 to give to Pipkin and Dunaway, got into his truck, and went home. Stripling testified that he did not think that he would get caught for beating up Watts because the Defendant was a police officer and told him that no one had called the police. Stripling testified that he put the closet rods in a dumpster after they completed the crime.

Stripling acknowledged that he pled guilty to aggravated assault for his involvement with this incident and that he received a sentence of one year of community corrections and four years of probation. He explained that he was charged with aggravated assault and aggravated burglary and that the District Attorney's Office offered to drop the aggravated burglary charge if he pled guilty to aggravated assault. Stripling said that he told the police what happened at Watts's house after he

was arrested, long before he pled guilty to the charge of aggravated assault. Stripling admitted that, around the time of this incident, he was selling marijuana, smoking marijuana every day, and getting drunk every night.

On cross-examination, Stripling testified that he was familiar with Watts's house because he was married to Watts's half-sister. Stripling said that, once Dunaway was inside the house, he ran to the side of the house, saw that a back porch light was on, and broke the porch light. He admitted that he had a conversation with Dunaway regarding this incident and then learned that this conversation was recorded. He admitted that, during this conversation, he lied about unscrewing the back porch light. He said that he was wary during this conversation because Dunaway kept asking stupid questions, but he did not recall everything that he said during this recorded conversation. He explained that, during the conversation, when he said that Watts tripped over his shoe strings he was joking with Dunaway about what Dunaway had told the police. When asked if he caused Watts's injury, which required fifteen staples, while stomping on Watts, Stripling said that he hit Watts in the head with a closet rod, kicked Watts in the face and the ribs, and punched him in the face. He acknowledged that Pipkin also beat Watts and said that both Dunaway and Pipkin hit Watts on the legs. He said that Watts was conscious during the entire beating. He acknowledged that, in a statement that he gave to the police, he said that Dunaway, and not the Defendant, called him on the night of the crime and told him to come to Applebee's with \$200, which was probably more accurate than his trial testimony. He admitted that he did not tell the police officers the truth throughout their entire investigation. He admitted that he has smoked marijuana and has been arrested for driving on a revoked license since he was placed on community corrections. He admitted that he does not have a valid driver's license and that he drove to court.

On redirect, Stripling testified that, three years ago, he provided the police with a statement about what had happened on the night of this incident. He said that he was scared the night that he got arrested and described how the police pulled him over, pulled out their guns, and one officer put his knee to his back. He explained that he told Officer Ryan what happened, and Officer Ryan wrote down what he thought Stripling was saying. He testified that, in the statement that he gave to Officer Ryan, he said that he hit Watts in the chest with a closet rod because he wanted to minimize the incident. The State asked Stripling several questions in detail about his pre-trial statement and explored similarities between his pre-trial statement and his in court testimony. Stripling acknowledged that he believed that his community corrections sentence might be affected when the judge learned that he had driven to court on a revoked license but that, nevertheless, he answered the question truthfully.

Danny Watts, the victim, testified that, on the day of this incident, two strangers came to his house while he was talking on the phone with his best friend, Matt Swank, and they asked him to take them to the gas station. Watts told the men that he could not help them, and one of the men asked to use his phone. Watts handed him the phone, the man gave Watts the phone back, and Watts shut the door. Watts testified that the men returned and offered him twenty dollars to take them to get gas, and Watts agreed to this offer. Watts said that a big man walked into his house and told Watts that he needed to use Watts's restroom. Watts noticed that the other man, who had initially knocked on

the door, was gone. Watts said that the man used his restroom, and then they went to a door that led to the back of Watts's driveway. Watts thought that someone pushed him out the door and someone else was waiting behind his car, which was right next to the doorway. Watts described how the man by his car knocked Watts on the head with a "wooden-dowel." He said that the men beat him severely, that he woke up later in a puddle of his own blood, and that he drove himself to the hospital. Watts testified that he stayed in the hospital overnight and then spent a week, at his grandmother's house, recovering from the incident at his grandmother's house.

On cross-examination, Watts recalled that, on the night of this incident, police officers came to the hospital, and he told them what had happened. He said that he broke the wooden dowel that the man swung at him by blocking it with his hand, but noted that the dowel hit and slashed his face. Watts testified that he did not know what caused the injury that required staples in his head. He said that he could not really determine what methods the men used to beat him but thought that he received a strike or two with the dowel and recalled that someone kicked him. He acknowledged that he never saw the Defendant.

Carolyn Miller, Watts's mother, testified that, on the day of the incident, she received a page from the hospital, learned that Watts was in the emergency room, and drove to the hospital. When she arrived at the hospital, she saw her son and recalled that "his face was almost not recognizable." She testified that she went with a police officer to Watts's house and that they saw blood outside the back door. She saw a wooden dowel laying in the driveway that looked like it was broken, and she noted that the light bulb located by the back door had been unscrewed and was laying down by the back door. On cross-examination, Miller acknowledged that Watts had black eyes, a broken nose, and some stitches.

Karon Ferguson testified that she met a friend, Tammy Fisher, at Applebee's on the day of this incident. She described how a lady who appeared to be intoxicated came up to their table and told them that some men at the bar wanted to buy them a drink. She recalled that the intoxicated lady told them that these men were undercover cops or "narcs." Ferguson testified that one of the men came over to her table, brought them a drink, and ended up paying for their dinner. After their meal, they moved to the bar and talked with these men. She recalled that she, her friend, a man named David, and a heavyset gentleman sat and talked at the bar for awhile. Ferguson recalled that they talked about a drug bust that the men were about to perform, and David said that he got paid \$200 for being an "undercover."

Tammy Fisher testified that she met her friend, Karon Ferguson, for dinner at Applebee's, and some men approached them and paid for their dinner. She heard the men talk about making drug busts and say that they were leaving the restaurant to go do a drug bust.

David Michael Dunaway testified that he first met the Defendant after a burglary had occurred on his street, and he called the police. The Defendant responded as an officer, and, when he arrived, Dunaway told the Defendant that two men who lived on his street had burglarized his house. He said that he asked the Defendant to enter the home of these men, and the Defendant replied that he did not

have permission to enter their home. The Defendant suggested that Dunaway enter the home, and the Defendant told him that the Defendant would “smooth it over” if someone called the police. Dunaway said that the Defendant offered to arrest Dunaway in front of the police called to the scene, drive away, and then release Dunaway. Dunaway said that he went inside two houses that belonged to people that may have taken his property him to look for his stolen property. He described how he developed a friendship with the Defendant after these events occurred, and he visited the Defendant’s house when the Defendant was both in and out of his police uniform. Dunaway described how he met Stripling with the Defendant when the three of them ran into each other at a Latham’s BP. Dunaway then said that he actually first met Stripling while working with the Drug Task Force because they both worked with a man named Malach and a man named Murphy.

Dunaway testified that the Defendant told Stripling and him that Watts pushed Officer Litton’s wife down in front of a Kmart. Dunaway said that he told the Defendant and Stripling that they should do something about Watts. Dunaway said that he thought they should “smack [Watts] around a little bit” because no one should hit a woman. He explained that he thought that he could beat Watts and that the Defendant could pretend to arrest him and then take him home. He said that Stripling wanted to get involved with this plan but that they decided to get another person to go to Watts’s house with Dunaway because they would get caught if Stripling went to Watts’s house since Watts knew Stripling.

Dunaway said that he called David Pipkin’s home and told his wife that he would pay Pipkin \$200 if Pipkin got Watts out of Watts’s house and that the purpose of this exercise was “to do this drug-buying thing.” He said that, a few days after this conversation, the Defendant called him and said that the day was “a good day.” Dunaway said that he picked up Pipkin and took him to Applebee’s where they met the Defendant and Stripling. He described how he and Pipkin began flirting with girls who were sitting at a table behind them and how they also spoke with a husband and wife. Dunaway said that the Defendant gave the husband ten dollars to go home in a cab and that they had to take the wife home. He testified that they left the bar around 8:00 p.m. because the Defendant, after they beat up Watts, wanted to pick-up his kids. He said that the Defendant told them to bring the wife with them so that the Defendant would have time to pick up his kids. He described how they proceeded from Applebee’s to Watts’s neighborhood and parked their cars. He said that the Defendant drove there in his personal car.

Dunaway described their plan to beat Watts as follows: Pipkin was supposed to get Watts to come outside; then Dunaway would beat up Watts while Stripling watched; and the Defendant was supposed to use his radio to monitor police calls and to notify them if someone called the police. He testified that they had discussed the plans for the Defendant to use his police radio in their earlier conversations at the BP.

Dunaway explained that, after they parked their cars, Stripling got masks and sticks out of the Defendant’s car, and he, Stripling, and Pipkin went to Watts’s house. He said that he and Stripling were wearing masks and holding sticks and that Pipkin knocked on the door, said that he was out of gas, and that Watts responded that he could not help. He described how Pipkin walked away from

the door and asked for another idea to get Watts to come out of his house. Dunaway told Pipkin to ask to use the phone, which Pipkin did, and Watts handed him a cordless phone. Pipkin pretended to use the cordless phone and handed it back to Watts. Dunaway said that he then went up to the door and told Watts that he ran out of gas and would pay Watts twenty dollars if Watts took him to get gas. Watts agreed and let him inside to use the restroom, and, when he came out of the restroom, Watts started walking towards the back door. Dunaway testified that he pushed Watts when they got to the back door, and he then heard a loud crack that sounded like a "bat hitting a ball at a ballpark." Dunaway testified that this sound was the loudest sound that he had ever heard in his life and that Watts yelled, "why, why, why?" He further testified that Stripling was holding part of a stick in his hand, and Pipkin looked shocked. Dunaway said that he took a stick and beat Watts with it while Stripling "stomp[ed]" on Watts's head. Dunaway described how Watts fell down after he hit him and how blood squirted everywhere. He said that Watts "was a bloody mess" and that he "couldn't even tell what [Watts] looked like." He further testified that he had "never done anything as gruesome as that in [his] whole life."

Dunaway said that Watts's car alarm sounded and everyone ran back to the cars. He described how he and Pipkin got into his truck and followed the Defendant and Stripling, who were in the Defendant's personal car. Dunaway said that the Defendant called him on his cell phone and said that he would bring Dunaway the money but that first the Defendant had to take Stripling back to Stripling's car. Dunaway said that they decided to meet at Grand Stands, and he and Pipkin went to Grand Stands where they met the Defendant who paid him \$200. Dunaway said that he split the money with Pipkin and spent that money on beer. He asked the Defendant if the Defendant had heard anything on his radio, and the Defendant responded that the police had been called to the hospital but were not looking for the perpetrators of the crime.

Dunaway described how, after this event had occurred, he saw Officer Litton and told him that Officer Litton owed him a favor. He recalled that Officer Litton looked confused and that Dunaway provided him with the following explanation, "Your wife. You don't have to worry about that kid bothering her no more or probably no one else. He had what was coming to him." The next night, Officer Litton came to his house asking for details about what happened between Dunaway and Watts, and Dunaway bragged about the incident involving Watts. Officer Litton was wearing a wire, and, ultimately Dunaway was brought to the police department. Dunaway confessed, was subsequently charged, and cooperated with the police.

On cross-examination, Dunaway did not recall making various statements when he bragged about the event to Officer Litton. Specifically, he did not recall informing Officer Litton that he told Watts, "Why don't I just go whoop your mom's a**, motherf***er." He testified that, when he committed the crime, he did not know why Stripling was involved and believed that Watts's treatment of Officer Litton's wife motivated everyone to beat up Watts. He testified that Stripling kicked and stomped Watts but could not recall if Stripling made other blows with his stick because he was busy beating Watts himself and could not keep up with everybody else's activities. He said that he hit Watts three to four times in the legs, and he said that he may have hit Watts more. He said that he minimized the beating that Watts received when he first told the police about the incident, and did

not recall telling the police that Stripling originally brought up the idea to beat Watts. He explained that, on the night of the incident, Pipkin thought that he was coming out to buy drugs for Malach and Murphy and did not understand the real plans until after he had a few beers. Dunaway noted that Stripling was excited about the incident and was the one who paid \$200 in order to execute the plan. He said that he did not know that Stripling planned to bring sticks when they went to Watts's home.

Dunaway testified that he had two or three conversations with the Defendant and Stripling about the plan to beat Watts. He said that he only met Stripling when Stripling was with the Defendant and that he did not speak with Stripling very much. He said that, not until after the alleged crime occurred, did he learn that Stripling was in a custody battle with Watts's stepsister and that Stripling believed Watts told others that Stripling was involved with drugs. Dunaway said that he learned more about Stripling's involvement with the beating when he went out to eat with Stripling after the incident had occurred.

When asked why, in the statement Dunaway gave to police, Dunaway had indicated that he knew about Stripling's motives before they committed the crime, Dunaway said that he must have mixed up the sequence of events. He said that the statement that he gave to the police was not accurate and that he was nervous when he provided the police with this statement. When asked about the \$200 ATM cash withdrawal from his account on the day of the crime, Dunaway testified that his wife must have made that withdrawal.

Matt Swank testified that he knew Watts and Stripling, and Watts is his good friend. He recalled that he received a phone call from Watts and that Watts said that two strange men were at his door asking for help because they had run out of gas. Swank told Watts not to help the men, he heard the phone hit the ground, and then heard a "boom" sound. Swank said that he knew something was wrong so he got into his car and drove to Watts's house, but no one was there when he arrived.

David Pipkin testified that he knew that the Defendant was a police officer because, previously, Pipkin's wife had hit Dunaway's truck, and the Defendant handled the accident. He said that he met Dunaway through his wife, who told him that Dunaway was an "undercover" and that Dunaway sometimes hired people to do jobs. He said that he discussed this with Dunaway a few times but never did any such work until one night when Dunaway offered to pay him \$200. Pipkin said that he met Dunaway, and they went to Applebee's and drank some beer. Pipkin said that he and Dunaway started talking to a couple of girls, and then the Defendant and Stripling, whom Pipkin had not met before, entered Applebee's. He said that they all sat around drinking, and he and Dunaway continued to flirt with the girls. Pipkin testified that Dunaway told the girls that he was an "undercover" and that Pipkin played along with Dunaway's story. He said that Dunaway told him that they wanted him to get someone out of his home so that they could talk to this individual without getting a search warrant. Pipkin testified that he had ten to fourteen beers and that Dunaway was drinking heavily. He did not know how much the Defendant and Stripling had to drink, and he did not recall who first suggested that they leave. He said that he, Dunaway, and another girl, who had been fighting with her husband at Applebee's, left for Watts's house in Dunaway's car.

Pipkin testified that he, Dunaway, and Stripling walked into Watts's yard, Dunaway told him to get Watts out of the house, and he knocked on Watts's door and said that he had run out of gas. He described how Watts said that he could not help him, he started to walk down the steps, and Dunaway got mad and told him to go back and try to get Watts out of the house. He said that, at this point in time, he saw that Dunaway and Stripling each held a mask and a stick. Pipkin described how he went back up the steps and asked Watts if he could use the phone, and Watts handed him a cordless phone that he pretended to use and then returned. Pipkin recalled that, when he walked back down the steps, Dunaway had his mask off and "shoved" the stick toward him. He said that he stood stunned and that Dunaway walked up the stairs. Pipkin testified that he went to where Stripling was standing and looked around and realized that Dunaway had gone into the house, and then Stripling ran around the side of the house towards the back. Pipkin said that he walked down the side of the house because he saw Stripling "take off." When he got to the back of the house, he saw a broken stick, Watts was on the ground, and Stripling was hitting and kicking Watts. Dunaway told him to give Dunaway the stick that he was holding, Pipkin threw the stick to Dunaway, and Dunaway used the stick to tap Watts a couple of times on the leg. Pipkin testified that, after this incident, they all left, and he and Dunaway went to Grand Stands where the Defendant met Dunaway and Pipkin and handed Dunaway \$200. Pipkin testified that Dunaway took the money and gave him \$100.

During cross-examination, Pipkin testified that he did not recall hearing the woman who had a fight with her husband say that she was a Tennessee Bureau of Investigation ("TBI") agent. He explained that Dunaway described how the undercover operation would work and told him to knock on Watts's door and ask for gas. He testified that he did not see Stripling and Dunaway carrying the sticks and masks when they walked to Watts's house together, and Dunaway did not hit Watts with the stick hard enough to leave a mark. He further testified that Stripling was doing most of the beating using his feet. He recalled that, when they returned to the cars on the street, the Defendant remained inside his vehicle, and, after they left Watts's house, he did not see the Defendant's car again until they got to Grand Stands.

David Michael Smith testified that he was friends with Dunaway's son John. He testified that he saw Dunaway in the Grand Stands parking lot on the day of this incident and thought that he saw someone sitting in a car close to Dunaway. He said that he spoke to Dunaway briefly and that Dunaway gave him twenty dollars and said, "Merry Christmas." Smith testified that later Dunaway asked him to provide the police with a statement. He recalled telling the police that he saw Dunaway at the Grand Stands with another man and a woman.

Chris Litton, a Hendersonville police officer, testified that his police radio allows him to communicate with other officers and that police officers receive calls from the dispatch center on their radios. He explained that, when a person calls to report a crime, a dispatcher takes that information and broadcasts the information to the police radios, and police officers respond to that information. He further explained that all officers that have these radios are able to monitor information reported by the dispatch center and the communication between officers. Smith described the buttons that police officers use to control their radios, the different channels that officers listen to, and how officers can scan all of the radio channels. He explained that, when police officers use their radios

like scanners, they can hear all the calls being dispatched, the location of the call, requests for more information on the call, and police officers' responses to the call, which includes information about how long the officers would take to respond to the call, and police officers' reports that they had arrived at the scene of a call. He explained that this was the type of equipment that police officers used on the night of the crime.

Officer Litton testified that Watts stole his wife's purse. He recalled that, when he was sitting on the side of the road in his patrol car, Dunaway pulled up next to Officer Litton's vehicle and said that Officer Litton "owed" him. He said that Dunaway initially indicated that he did not want to explain why Officer Litton owed him but then told Officer Litton about what had occurred at Watts's house. Officer Litton testified that he went to speak with his supervisor, and he then went to Dunaway's home to learn more about the beating that Watts received. After hearing this information, Officer Litton was concerned because he did not want to be implicated in Watts's beating.

After learning more about what happened at Watts's house, Officer Litton called the Defendant in order to retrieve more information about the incident at Watts's house, and he recorded this phone call. Officer Litton explained that he was not truthful during this phone conversation, and he told the Defendant things that were not necessarily true in order to elicit a response from the Defendant. Officer Litton explained that, during this phone call, he pretended to be the Defendant's friend. He told the Defendant that a detective had followed one of the suspects that left Watts's house, and the Defendant said that no detectives were there and that nobody responded to the scene. Officer Litton testified that, when he told the Defendant how Dunaway told him about the event, the Defendant said that he told Dunaway to be quiet about the incident. Officer Litton told the Defendant that Dunaway said that the Defendant had used his police radio while the others beat Watts. Officer Litton told the Defendant that he had previously used his radio when he wanted to meet someone to monitor officer activity, and the Defendant responded, "Exactly." Officer Litton explained that, after he and the Defendant talked about pictures that were taken of Watts, the Defendant said that he wanted to see the pictures. A tape recording of this phone conversation was played for the jury.

On cross-examination, Officer Litton explained that Wal-Mart sells scanners that perform the same scanning functions as police radios. Officer Litton did not know if the radio signals between the dispatch center and police officers were guarded radio signals. He acknowledged that he planned to tell the Defendant lies during their phone conversation. He explained that during this conversation, when he told the Defendant, "I'm in this now," he intended to indicate that he could be liable for not reporting the event to his supervisor. Officer Litton acknowledged that he saw Watts immediately after Watts tried to steal his wife's purse. He admitted that he inappropriately yelled at Watts when he saw him and that he probably yelled something along the lines of "be glad that I wasn't there because if I was there I'd be able to protect my wife." He admitted that others who heard him may have assumed that he wanted someone to harm Watts, that Watts's assault was a "hot topic" at the police station, and that this concerned him because he knew that Watts was the person who had taken his wife's purse. He testified that another officer told him that people went to Watts's house asking for help with gas and then they beat Watts up in Watts's backyard. He admitted that he had no personal knowledge about whether the Defendant was telling him the truth during their phone

conversation.

The Defendant testified on his own behalf, and he denied that he had any involvement with Watts's assault. He testified that he knew Dunaway and Stripling prior to this incident but that he first met Pipkin on the night of the alleged crime. He described the Latham's BP and explained that there is a picnic table inside the middle of the store next to the cash register and that people enter and exit the store on a regular basis. He further explained that this BP serves as a center point in town where people stop and talk. The Defendant testified that he was usually on duty when he stopped at the Latham's BP and that, when he spoke with Stripling there, their conversations generally consisted of small talk. He testified that Dunaway was very interested in the Defendant's police work and would ask him questions about his work. He denied ever talking to these men about beating up Watts.

The Defendant testified that he first met Dunaway when he was on duty in Dunaway's neighborhood. He explained that robberies had been reported in that vicinity and that, in order to investigate, he asked the residents in the area for information regarding the reported crimes. He testified that, when he spoke with Dunaway, Dunaway told him that someone stole Dunaway's phone from Dunaway's unlocked truck. He explained that he started talking with Dunaway, and Dunaway was very funny so the two became good friends. He denied doing anything illegal when he first met Dunaway.

The Defendant testified that he met Stripling at the Latham's BP through a mutual friend and that he ran into Stripling quite a few times inside the store. He could not recall if he introduced Dunaway to Stripling. The Defendant said that he and Dunaway discussed Watts's theft and that both men thought that the crime was funny because Watts took the purse and then went through the purse in the same parking lot where he committed the theft. He further testified that this crime "was just something you talk about." The Defendant denied ever wanting to hurt Watts because Watts committed this crime. He did not recall having any other conversations with Stripling or Dunaway about Watts's crime.

The Defendant testified that, on the day of this incident, Dunaway had called him, told him to come to Applebee's, and offered to buy him dinner and drinks. The Defendant said that, before he went to Applebee's, he had gone home after work and taken off his uniform, put his radio away, and charged his battery for the next day. He said that he did not have his police radio with him when he went to Applebee's, and, when he arrived at Applebee's, he saw Dunaway, who introduced the Defendant to Pipkin. The Defendant denied having any conversations with Dunaway and Pipkin about undercover operations.

At the bar, the Defendant saw a husband and wife whom he knew because he had arrested the husband for harassing the wife on a prior occasion. The Defendant noted that he grew up in the same town as the husband and said that he sat next to the husband because the wife was talking with Dunaway and Pipkin. The Defendant estimated that he sat at the bar for approximately three hours, and, while he was there, Stripling came into Applebee's and talked to Dunaway and Pipkin. The

Defendant testified that Dunaway and Pipkin went to flirt with some women who were sitting at tables behind the bar, and he thought that Stripling joined Pipkin and Dunaway. The Defendant testified that he could not hear the conversation that Pipkin and Dunaway were having with these women, and everyone in Applebee's was drinking except for Stripling. The Defendant said that, at one point, Dunaway got into a heated argument with the husband, and the Defendant took the husband out to the front of the restaurant, had someone call a cab, and paid ten dollars to send the husband home.

The Defendant testified that Dunaway walked out the front door of Applebee's with Pipkin and said to the Defendant, "Come on. Let's go." The Defendant, who was intoxicated, and Stripling followed Dunaway and Pipkin because Dunaway was fun to be around. The Defendant said that Pipkin and Dunaway got into a pick-up truck, the Defendant got into his car, Stripling asked him for a ride and gave him directions to their destination. The Defendant said that he had never been in the area of their destination before, but he knew that one of Dunaway's friends lived in the neighborhood. He testified that Dunaway came up to his car and told him to wait in his car and that Dunaway and Pipkin would be right back. He said that Stripling got out of the car, and the men walked away. The Defendant did not see if the men were carrying anything because he was not looking at them. He said that the men came back to their vehicles a few minutes later, and Pipkin and Dunaway got inside the pick-up truck and drove past his car. The Defendant said that he rolled down his car window as they drove past his car, but they did not stop to speak with him. Stripling got into his car and said, "Come on. Let's go," and then he asked the Defendant to take him to Latham's BP, which he did.

The Defendant testified that, the next day at work, he heard officers discussing Watts's assault. After hearing others talk about the incident, he started putting two and two together and realized that he was in the vicinity of the assault when it occurred. He explained that "it is impossible to tell you what I knew at that time, but I was in that area and all of a sudden it suddenly hits you." He said that, next, he had a conversation with Dunaway about the officers' discussions, but he had a hard time learning what happened because Dunaway did not tell him the whole story. The Defendant did not know why he did not report this event to his commanding officer.

The Defendant explained that, when he received the recorded phone call from Officer Litton, he had already figured out what happened on the night of Watts's assault. The Defendant described various factors that influenced his responses to Officer Litton during that conversation, saying that he was having personal problems, that he separated from his wife, and that he was having problems with his girlfriend. He further testified that he had difficulties with the uniform policies at the police department. The Defendant said that he was not proud of the language that he used when talking with Officer Litton during the recorded phone call. He further explained, "You talk to somebody - - and . . . you tend to talk back to them in the same manner He was naturally leading to what he wanted to hear."

On cross-examination, the Defendant testified that he did not know what was going to happen at Watts's home and that the incident was a misunderstanding. He testified that he lied to Officer Litton during their phone conversation and that he made a mistake when he did not tell Officer Litton

that he did not know that everyone planned to beat up Watts on the night of this incident. He acknowledged that, at the time of his phone conversation with Officer Litton, he knew that a crime had been committed involving Watts but said that he did not realize that the crime was a felony assault. The Defendant testified that, during his conversation with Officer Litton, he said, “Motherf***er that gets 15 to \$1,600 a month for nothing just to blow up his nose And he’s going to rob a cop’s . . . wife?” He acknowledged that he described Watts’s beating as an “a** whooping” during this phone conversation. The Defendant said that he never saw sticks on the night of the crime and that he would not let someone put a stick in his car. He testified that he wanted the incident “to go away” but that he did not try to “cover up” the situation. He admitted that he told Dunaway not to tell anyone about the attack and said that he was embarrassed by his behavior after he learned what happened on the night of the crime. He said that, until he was arrested, he did not know the extent of Watts’s injuries. He acknowledged that, when he spoke with Officer Litton on the phone, he thought that Watts was too hurt to drive himself to the hospital on the night of the crime.

Based upon the foregoing evidence, the jury convicted the Defendant of criminal responsibility for especially aggravated burglary, criminal responsibility for aggravated assault, and official misconduct.

II. Analysis

On appeal, the Defendant contends that: (1) the trial court erred when it denied his motion to exclude testimony about the Defendant’s prior bad acts; (2) the trial court erred when it rejected the Defendant’s application for pre-trial diversion; (3) the trial court erred when it rejected the Defendant’s claim that the State had to elect between the offenses of especially aggravated burglary and aggravated assault; (4) Tennessee Code Annotated section 39-16-402 (2003) (official misconduct) is unconstitutional in that it fails to give notice of prohibited conduct; (5) the trial court erred when it allowed the prosecution to amend the indictment; (6) the evidence presented at trial is insufficient to support the Defendant’s convictions; (7) the trial court erred when it allowed the State to introduce evidence at trial despite the fact that the State failed to comply with Tennessee Rule of Criminal Procedure 16(a)(1)(c); (8) the trial court erred when it allowed entire pre-trial statements into evidence; (9) the trial court improperly allowed hearsay testimony into the evidence; (10) the trial court allowed the State to present an improper closing argument; (11) the trial court erred when it failed to require the State to elect, for which co-defendant’s commission of aggravated assault the Defendant was being held responsible; and (12) the trial court erred when it sentenced the Defendant.

A. Evidence of Defendant’s Prior Misconduct

The Defendant contends that the trial court erred when it denied his motion to exclude Dunaway’s testimony about how the Defendant acted as a lookout so that Dunaway could enter two neighbors’ homes knowing that, if the police were called, the Defendant would respond and smooth it over and not arrest him. The State contends that the trial court did not abuse its discretion when it allowed such testimony into evidence because it proved absence of mistake by rebutting the

Defendant's defense that he did not know Dunaway intended to assault Watts. At a 404(b) hearing, Dunaway testified that the prosecutor asked him about planning the attack on Danny Watts with the Defendant, and he told the prosecutor that the Defendant had done something sort of like that before. Dunaway described the previous incident, stating:

It happened that me and a buddy of ours, our street had got robbed. And there were these drug boys lived two doors up. And [the Defendant] answered the call when I called the police. [The Defendant] came over, and he said – I said, can you go inside to see if our stuff is in there. And he said he couldn't go inside. He said we could go inside, me and my buddy. And I mentioned getting in trouble, and he said they would call the police; if they called the police, they would call him because it is his zone and he would just let us go.

THE COURT: He would what?

[DUNAWAY]: Like, if we got arrested, he would let us go. He parked down the street anyway. So we went in the first house that belonged to the Streets, and then he turned us on another dude that might have done it named A. D. – and the last names I don't know – on Chippendale, a few streets over.

So me and my buddy drove over there. He parked down the street as – well, in case he got called, and then he would come get us and make us leave, but we wouldn't get in no trouble.

Dunaway testified that, when they went to the homes to retrieve their property, they knocked on the door. The occupants were home and came to the door, and he and his friend “kind of moved in.” Dunaway said that the Defendant was acting as “an escape thing” in case the occupants called the police. The trial court deferred ruling on the issue until during the trial.

During the trial and after a hearing outside the presence of the jury, the trial court held that Dunaway's testimony about the Defendant's prior bad act:

[D]oes come in for the purpose of proving intent, motive, and absence of mistake. The question I have is on probative versus prejudicial. I think it is highly probative. I think it is prejudicial. All evidence is prejudicial to some extent. But I do think that it is probative, and that, therefore, I am going to allow the State to use it.

Under Tennessee law, relevant evidence is generally admissible unless its probative value is substantially outweighed by its prejudicial effect. See Tenn. R. Evid. 402 and 403. Evidence is “relevant” if it tends to “make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. Rule 404(b) states that evidence of “other crimes, wrongs or acts is not admissible to prove the character of a person or to show action in conformity with the character trait” but that such evidence

“may . . . be admissible for other purposes.” The rule includes the following procedures for determining the admissibility of 404(b) evidence:

- (1) The court upon request must hold a hearing outside the jury’s presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b). The safeguards in Rule 404(b) ensure that defendants are not convicted for charged offenses based on evidence of prior crimes, wrongs or acts. State v. James, 81 S.W.3d 751, 758 (Tenn. 2002). Where the procedures “are substantially followed, the trial court’s decision will be given great deference and will be reversed only for an abuse of discretion.” Id. at 759; see also State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). However, the decision of the trial court is afforded no deference, and our review is de novo, if the procedural requirements are not substantially followed. Id. In the case under submission, we conclude that the trial court substantially followed the procedural requirements of Rule 404(b), and the court’s decision therefore will be given great weight.

Traditionally, courts have not permitted the state to establish through acts of prior misconduct any generalized propensity on the part of a defendant to commit crimes. See, e.g., State v. Teague, 645 S.W.2d 392 (Tenn. 1983). Most authorities suggest that trial courts take a “restrictive approach of 404(b) . . . because ‘other act’ evidence carries a significant potential for unfairly influencing a jury.” Neil P. Cohen et al., Tennessee Law of Evidence § 4.04[8][e] (4th ed. 2000). A jury cannot be allowed to convict a defendant for bad character or any particular disposition to commit a crime regardless of the strength of the evidence concerning the offense on trial. State v. Rickman, 876 S.W.2d 824, 828 (Tenn. 1994)(citing Anderson v. State, 56 S.W.2d 731 (Tenn. 1933)). In those instances where the prior conduct or acts are similar to the crimes on trial, the potential for a prejudicial result increases. State v. Mallard, 40 S.W.3d 473, 488 (Tenn. 2001).

Although Rule 404(b) is generally regarded as being a rule of exclusion, it may equally be viewed as a rule of inclusion, if the prior bad acts or crimes of the accused are admissible for purposes other than to prove character. “Other purposes” have been defined to include: (1) motive; (2) intent; (3) guilty knowledge; (4) identity of the defendant; (5) absence of mistake or accident; (6) a common scheme or plan; (7) completion of the story; (8) opportunity; and (9) preparation. Collard v. State, 526 S.W.2d 112, 114 (Tenn. 1975); see also Neil P. Cohen, et al., Tennessee Law of Evidence § 404.6 (3d ed. 1995). Additionally, the other purposes” must meet the relevancy requirement of Rule 401; the defined purpose for introduction of the prior bad acts of the accused must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401.

After thoroughly reviewing the testimony, we conclude that the testimony about the

Defendant's prior conduct constituted testimony about a prior bad act and not a prior crime. The Defendant responded to a call and told Dunaway that he could not properly enter the home where Dunaway suspected that the property stolen from his was being kept. The Defendant told Dunaway that Dunaway could go look for his own property, and Dunaway went to the home, knocked on the door, someone answered the door and allowed him to enter. The Defendant waited down the street so that if the police were called he could "smooth it over" but not arrest Dunaway. This behavior by the Defendant constitutes a bad act, but it does not rise to the level of a crime.

Further, based on our de novo review of the record, we conclude that the Defendant's prior bad act was relevant to rebut the Defendant's claim that he did not know that his confederates planned to beat up Watts and to show Dunaway's state of mind. We note that, even if the challenged evidence is relevant to an issue other than character, such evidence must be excluded if the danger of unfair prejudice outweighs the probative value. State v. Howell, 868 S.W.238, 254 (Tenn. 1993). Here, the probative value of the evidence outweighs any unfair prejudice. First, the evidence is probative of the Defendant's relationship with Dunaway and their past dealings. It was relevant to prove absence of mistake in that the Defendant knew that Dunaway had previously relied upon the Defendant as an "escape" in the event that the police were called and that the Defendant had previously agreed to not arrest Dunaway if the police were called. Further, this evidence was relevant to prove that Dunaway had, in the past, relied upon the Defendant's protection as a police officer to avoid trouble. We agree with the trial court's conclusion that the probative value of this evidence outweighed its prejudicial effect. The trial court did not abuse its discretion in admitting this evidence.

B. Denial of Pretrial Diversion

The Defendant contends that the trial court erred when it concluded that the Assistant District Attorney General did not abuse his discretion when he denied the Defendant's petition for pre-trial diversion. The Defendant argues that, because Watts's injuries did not amount to serious bodily injury, he should not have been charged with especially aggravated burglary, a class B felony that rendered him ineligible for pre-trial diversion. Without the allegation of serious bodily injury, the charge against the Defendant would have been aggravated burglary, a class C felony, and the Defendant would have been eligible for pretrial diversion. The Defendant argues that this Court should require more than a review of the indictment in any pretrial diversion case because otherwise the District Attorney is able to insulate any decision from review by simply "over indicting" a case. The State argues that the record and the law support both the prosecutor's denial of pre-trial diversion and the trial court's rejection of the Defendant's petition for certiorari to review the Assistant Attorney General's decision. The trial court found that the serious bodily injury "is a question of fact for the jury" and failed to find that the Assistant District Attorney General abused his discretion when denying pretrial diversion.

Pretrial diversion allows the District Attorney General to suspend prosecution for a period of up to two years against a defendant who meets certain statutory requirements. See Tenn. Code Ann. § 40-15-105(a)(1)(A) (2003). "The Legislature has provided pre-trial diversion for certain classes of offenders and we hold that the determination of whether a defendant is within or without the eligible

class is irrevocably determined by the indictment.” State v. Landers, 723 S.W.2d 950, 952 (Tenn. 1987). “Once the prosecution decides to have a defendant indicted for an indivertible offense, he cannot then extend the benefits of pretrial diversion to those offenders not included by the pretrial diversion statute. To do so would be unlawful.” State v. Tommy Lee Manor, No. 01C019512CC00435, 1997 WL 230159, at *1 (Tenn. Crim. App., at Nashville, May 7, 1997) *no Tenn. R. App. P. 11 application filed*. In order to qualify for pretrial diversion, a defendant must not be seeking diversion for a class A or B felony. Tenn. Code Ann. § 40-15-105(a)(1)(B)(I)(c); see also State v. Brooks, 943 S.W.2d 411, 412 (Tenn. Crim. App. 1997). As previously stated, a defendant’s eligibility or pre-trial diversion is “irrevocably determined by the indictment.” Landers, 723 S.W.2d at 952.

With regard to indicting defendants, the prosecutor is vested with broad discretionary power, most of which is not subject to judicial control. State v. Harris, 33 S.W.3d 767, 770 (Tenn. 2000); see also State v. Stephen W. Drake, No. 84-184-III, 1985 WL 4559, at *3 (Tenn. Crim. App., at Nashville, Dec. 20, 1985), *no Tenn. R. App. P. 11 application filed*. So long as the prosecutor has probable cause to believe that the accused committed an offense, the decision whether to prosecute, and what charge to file or bring before a grand jury generally rests entirely within the prosecutor’s discretion. Harris, 33 S.W.3d at 770. The Tennessee Supreme Court has noted that the District Attorney General in Tennessee has “virtually unbridled discretion in determining whether to prosecute and for what offense.” State v. Super Oil, Inc., 875 S.W.2d 658, 660 (Tenn. 1994) (quoting Dearborne v. State, 575 S.W.2d 259, 262 (Tenn. 1978)). Courts must respect the broad discretionary powers given prosecutors. State v. Howell, 868 S.W.2d at 272.

In accordance with the aforementioned law, the District Attorney and the Assistant District Attorney in this case had virtually unbridled discretion in determining whether to prosecute the Defendant for the class B felony, especially aggravated burglary. The Defendant has failed to prove that the prosecutors abused this discretion. Therefore, as the Defendant was charged with a class B felony, the Defendant was ineligible for consideration of pre-trial diversion, and he is not entitled to relief on this issue.

C. Election of Offenses

The Defendant alleges that, in his indictment, the especially aggravated burglary count and the aggravated assault count arose from the same acts and that, therefore, under Tennessee Code Annotated section 39-14-404(d) (2003), the State was required to prosecute the Defendant for either the especially aggravated burglary count or the aggravated assault count, but not both. The Defendant contends that the trial court erred when it failed to require that the State elect between these two counts in the indictment. The State counters that the State prosecuted the Defendant for two separate acts and that the two charges against the Defendant have discrete elements, and, therefore, Tennessee Code Annotated section 39-14-404(d) does not require the State to prosecute one to the exclusion of the other. The trial court found that because the especially aggravated burglary charge was based on an allegation that the victim suffered serious bodily injury and the aggravated assault charge was based upon the use of a deadly weapon, the elements of the offenses were not the same and did not

violate Tennessee Code Annotated section 39-14-404(d). We agree.

Under Tennessee Code Annotated section 39-14-404(a), especially aggravated burglary is a burglary of a habitation or building that results in serious bodily injury. “Serious bodily injury” means bodily injury which involves: “(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty.” Tenn. Code Ann. 39-11-106(a)(34) (2003). Pursuant to Tennessee Code Annotated section 39-14-404(d), “Acts which constitute an offense under this section may be prosecuted under this section or any other applicable section, but not both.” Consequently, “[t]his subsection prohibits using the same act to prosecute an accused for both especially aggravated burglary and another offense.” State v. Oller, 851 S.W.2d 841, 843 (Tenn. Crim. App. 1992).

Under Tennessee Code Annotated section 39-13-102 (2003), a person commits aggravated assault if they commit assault and (1) cause serious bodily injury *or* (2) use or display a deadly weapon. Under Tennessee Code Annotated section 39-13-101(a) (2003), a person commits assault who “(1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.” Tennessee Code Annotated § 39-11-106(a)(2) (2003) defines bodily injury as “a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of a bodily member, organ or mental faculty.”

Therefore, if the State relies on serious bodily injury to prove the aggravated assault, it would be unable to prosecute a defendant for that crime and also for especially aggravated burglary based upon the same serious bodily injury. See Tenn. Code Ann. § 39-14-404(d). In the case under submission, however, the aggravated assault charge did not depend on allegations of serious bodily injury. The indictment for aggravated assault specifically alleges that the Defendant was criminally responsible for those who “did unlawfully, intentionally, and knowingly cause bodily injury to Daniel Watts by use of a deadly weapon, to-wit: a wooden stick.” This aggravated assault charge clearly contends that the Defendant is responsible for an assault with the use of a deadly weapon and not for the victim’s serious bodily injury. The bodily injury element of assault differs from the element of serious bodily injury required for a conviction of especially aggravated burglary.

The especially aggravated burglary charge focuses on the Defendant’s responsibility for Watts’s serious bodily injury, and the indictment alleges that the Defendant is criminally responsible for the actions of those who “did unlawfully enter the habitation of Daniel Watts, without his effective consent, with intent to commit a felony or assault, and Daniel Watts suffered serious bodily injury as a result.” Therefore, the aggravated assault charge was based upon different elements and actions than the especially aggravated burglary charge. Because the especially aggravated burglary charge was based on an allegation that the victim suffered serious bodily injury and the aggravated assault charge was based upon the use of a deadly weapon, the elements of the offenses were not the same and did not violate Tennessee Code Annotated section 39-14-404(d). The Defendant is not entitled

to relief on this issue.

D. Official Misconduct Statute

The Defendant contends that Tennessee Code Annotated section 39-14-402 (2003) is unconstitutional in that it fails to give proper notice of prohibited conduct. Under this statute: “A public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly . . . [c]ommits an act relating to the servant’s office or employment that constitutes an unauthorized exercise of official power” Tenn. Code Ann. § 39-16-402(a)(1) (2003). “‘Act’ means a bodily movement, whether voluntary or involuntary, and includes speech” *Id.* § 39-16-401(1) (2003). The Defendant contends that the phrase “commits an act relating to the servant’s office” is so vague and over broad that the statute, as written, opens the door for potential defendants to be charged for any number of seemingly innocent acts. Further, he asserts that the accusations that he violated the statute by “being a lookout” or “monitoring” a police scanner are not acts relating to “office or employment” because those acts have nothing to do with the functions of a police officer and are, in fact, acts engaged in by other members of the public. The State contends that the statute is sufficiently clear to provide adequate warning to police officers so that they might avoid the prohibited conduct. The State further argues that the Defendant “with intent to harm another, did commit an act under the color of employment that exceeds his official power by taking advantage of his capacity of a police officer” by using his police scanner to be a lookout while his confederates criminally assaulted the victim.

Generally, the language of a penal statute must be clear and concise to give adequate warning so that individuals might avoid the prohibited conduct. *See State v. Smith*, 48 S.W.3d 159, 165 (Tenn. Crim. App. 2000). A statute is void for vagueness if it is not “sufficiently precise to put an individual on notice of prohibited activities.” *State v. Joseph Choi-Choi Wong*, No. M2003-0054-CCA-R3-CD, 2004 WL 1434384, at *11 (Tenn. Crim. App., at Nashville, June 25, 2004), *perm. app. denied* (Tenn. Dec. 6, 2004) (quoting *State v. Thomas*, 635 S.W.2d 114, 116 (Tenn. 1982)). A criminal statute “shall be construed according to the fair import of [its] terms” when determining if it is vague. Tenn. Code Ann. § 39-11-104 (2003). “Due process requires that a statute provide ‘fair warning’ and prohibits holding an individual criminally liable for conduct that a person of common intelligence would not have reasonably understood to be proscribed.” *State v. Burkhardt*, 58 S.W.3d 694, 697 (Tenn. 2001) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)).

Our Supreme Court has noted that “absolute precision in drafting prohibitory legislation is not required since prosecution could then easily be evaded by schemes and devices.” *State v. Wilkins*, 655 S.W.2d 914, 916 (Tenn. 1983) *superseded, on other grounds, by statute* 1989 Tenn. Pub. Acts Ch. 591 (S.B.1194), *as recognized in State v. Dominy*, 6 S.W.3d 472 (Tenn. 1999). To determine whether a statute is unconstitutionally vague, a court should consider whether the statute’s prohibitions are not clearly defined and are thus susceptible to different interpretations regarding that which the statute actually proscribes. *State v. Whitehead*, 43 S.W.3d 921, 928 (Tenn. Crim. App. 2000). A statute is not unconstitutionally vague “‘which by orderly processes of litigation can be rendered sufficiently definite and certain for purposes of judicial decision.’” *Wilkins*, 655 S.W.2d

at 916 (quoting Donathan v. McMinn County, 213 S.W.2d 173, 176 (Tenn. 1948)). Appellate courts are charged with upholding the constitutionality of statutes wherever possible. State v. Lyons, 802 S.W.2d 590, 592 (Tenn. 1990).

We conclude that the statute under which the Defendant was convicted was not unconstitutionally vague. In reaching this conclusion, we note that this Court, while not specifically addressing the issue of the vagueness of the phrase “commits an act relating to the servant’s office,” has upheld the constitutionality of Tennessee Code Annotated section 39-14-402 on the basis that “the statute is sufficiently clear and concise to provide adequate warning to police officers so that they might avoid the prohibited conduct.” See State v. Boyd, 797 S.W.2d 589, 593-94 (Tenn. 1990); State v. John Paul Szczepanowski, No. E2000-03124-CCA-R3-CD, 2002 WL 1358681, at *13-14 (Tenn. Crim. App. at Knoxville, June 24 2002), *perm. app. denied* (Tenn. Dec. 2, 2002). We also conclude that the statute in this case is sufficiently precise to have put the Defendant on notice of the charges against him and that a person of common intelligence could reasonably understand what acts the statute proscribes. The statute prohibits any conduct that lies beyond the permissible limits of official power granted to a police officer. Using equipment obtained via employment as a police officer to facilitate the perpetration of a crime clearly falls within this statute’s parameters. Accordingly, the Defendant is not entitled to relief on this issue.

E. Amendment of the Indictment

The Defendant contends that the trial court erred when it allowed the State to amend count four in the Defendant’s indictment, which alleged that he engaged in official misconduct in violation of Tennessee Code Annotated section 39-14-402. Specifically, the Defendant contends that the State violated his constitutional rights by amending the indictment to read that the Defendant “intentionally or knowingly” committed the crime. Because such language was not included in the original indictment presented to the grand jury, the Defendant argues that he was tried and convicted on a charge for which he was never indicted. The State argues that permitting the amendment to the indictment did not violate the Defendant’s rights because the trial court allowed the amendment before the jury was impaneled, when double jeopardy would attach, and because the amendment did not charge a different offense than the one charged in the original indictment. The State further argues that the Defendant was not prejudiced by the amendment because, even without the amendment, the charge was sufficient to meet the constitutional requirements that an indictment provide notice of the charge, an adequate basis to enter judgment, and protection from double jeopardy.

Pursuant to Tennessee Code Annotated section 39-16-402(a)(2), official misconduct involves a public servant who has “with the intent to obtain a benefit or to harm another, intentionally or knowingly” performed an act that “under color of office or employment that exceeds the servant’s official power.” On March 12, 2003, over a year before the trial began, the Defendant’s counsel filed a motion to dismiss count four of the indictment, which alleged that:

[The Defendant] . . . “being a public servant, namely a Hendersonville, Tennessee

[p]olice [o]fficer, and with intent to harm another, did commit an act under color of employment that exceeds his official power by taking advantage of his capacity as a police officer to monitor his police scanner and be a lookout while other persons committed a criminal assault on Daniel Watts, thus assuring that said criminal assault would not be detected by other law enforcement officers.

The State argued that this charge was sufficient under the law. The trial court made the following holding:

Well, I think that the indictment is not properly drawn, but I don't think it is fatal because I think at the time that we have the trial the Court is certainly going to instruct the jury on the mental elements that have to be proven

The trial court then allowed the State to amend the indictment and to add the words "intentionally or knowingly" before the word commit so that the charge stated "being a public servant, namely a Hendersonville, Tennessee police officer, and with intent to harm another, did intentionally or knowingly commit an act under color of employment" The record reflects that jury selection occurred on July 6, 2004, over a year after the court allowed the amendment to the indictment. At trial, the Defendant again asserted that the trial court improperly allowed the State to amend count four of the indictment, and the trial court responded that "there was sufficient notice to the [D]efendant, that the [D]efendant is not prejudiced by allowing the amendment that I had apparently allowed a year or so ago."

Rule 7(b) of the Tennessee Rules of Criminal Procedure states: "An indictment, presentment or information may be amended in all cases with the consent of the defendant. If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches." Article I, section 14 of the Tennessee Constitution provides that "no person shall be put to answer any criminal charge but by presentment, indictment, or impeachment."

To allow a prosecutor or court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the Defendant of a basic protection that the grand jury was designed to secure because a defendant would then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him.

State v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1993). In order to comply with constitutional guidelines, an indictment or presentment must provide notice of the offense charged, adequate grounds upon which a proper judgment may be entered, and suitable protection against double jeopardy. State v. Byrd, 820 S.W.2d 739 (Tenn. 1991).

In State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997), the Tennessee Supreme Court reversed the Court of Criminal Appeals holding that the indictment was void because it failed to explicitly

allege mens rea, one of the essential elements of the offense of aggravated rape, and explained that “the purpose of the traditionally strict pleading requirement was the existence of common law offenses whose elements were not easily ascertained by reference to a statute.” Id. at 727. “Hill and its progeny leave little doubt that indictments which achieve the overriding purpose of notice to the accused will be considered sufficient to satisfy both constitutional and statutory requirements.” State v. Hammonds, 30 S.W.3d 294, 300 (Tenn. 2000). Specific reference to a statute within the indictment may be sufficient to place the accused on notice of the charged offense. State v. Sledge, 15 S.W.3d 93, 95 (Tenn. 2000) (holding that the omission of a culpable mental state in the indictment for felony murder did not render the indictment insufficient to support a conviction). An indictment must also meet the statutory requirements of Tennessee Code Annotated section 40-13-202 (2003), which provides:

The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty, which will enable the court, on conviction, to pronounce the proper judgment; and in no case are such words as “force and arms” or “contrary to the form of the statute” necessary.

In the case under submission, the indictment meets both the constitutional and statutory requirements. The indictment in this case fully informed the Defendant of the elements of the offense to be charged, and the Defendant was not prejudiced by the indictment. The indictment states the accusation to which the Defendant was required to answer and does this in ordinary language so that a person of common understanding would know what is intended. The Defendant’s reliance on Perkinson for the contention that his conviction for official misconduct should be reversed and dismissed is misplaced. Perkinson, 867 S.W.2d at 5. In Perkinson, the indictment did not allege an essential element of the charge of conspiracy to commit first-degree murder because the indictment failed to assert that the defendant committed an overt act in pursuance of the conspiracy. Id. In the case under submission, the trial court allowed an amendment to the indictment that clarified the mens rea already expressed in the charge that referred to the statute under which the Defendant was charged. Therefore, the indictment in the case under submission fully informed the Defendant of the elements of the offense to be charged, and the Defendant was not prejudiced by the indictment. The Defendant is not entitled to relief on this issue.

F. Sufficiency of the Evidence

The Defendant contends that the evidence is insufficient to support his convictions. When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004) (citing State v. Reid, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass, 13 S.W.3d 389, 392-

93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). Questions concerning the credibility of the witnesses, the weight and value of the evidence, and all factual issues raised by the evidence are resolved by the trier of fact. Liakas, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Our Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (1966) (citing Caroll v. State, 370 S.W.2d 523 (1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. Goodwin, 143 S.W.3d at 775 (citing State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. Id.; see State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000). However, before an accused can be convicted of a criminal offense based on circumstantial evidence alone, the facts and circumstances “‘must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant’” Id. (quoting State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971)). “In other words, a web of guilt must be woven around the defendant from which he cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.” Id. (quoting Crawford, 470 S.W.2d at 613). “A person is criminally responsible for an offense committed by the conduct of another if . . . [a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense” Tenn. Code Ann. § 39-11-402(2) (2003). “Each party to an offense may be charged with commission of the offense.” Id. § 39-11-401(b) (2003).

We note that it is well-established law in Tennessee that the testimony of a victim, standing alone, is sufficient to support a conviction. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993); State v. Williams, 623 S.W.2d 118, 120 (Tenn. Crim. App. 1981). It is well settled law that a defendant cannot be convicted solely upon the uncorroborated testimony of an accomplice. An accomplice has traditionally been defined as one who knowingly, voluntarily, and with common

intent with the principal offender, joins in the commission of a crime. State v. Griffis, 964 S.W.2d 577, 588 (Tenn. Crim. App. 1997). Where there is testimony of multiple accomplices, there must still be corroboration since accomplices cannot corroborate each other. State v. Allen, 976 S.W.2d 661, 666 (Tenn. Crim. App. 1997). In Griffis, this Court explained that:

The evidence corroborating the testimony of an accomplice may consist of direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. The quantum of evidence necessary to corroborate an accomplice's testimony is not required to be sufficient enough to support the accused's conviction independent of the accomplice's testimony nor is it required to extend to every portion of the accomplice's testimony. To the contrary, only slight circumstances are required to corroborate an accomplice's testimony. The corroborating evidence is sufficient if it connects the accused with the crime in question.

Griffis, 964 S.W.2d at 589. Those circumstances must, however, be entirely independent of the accomplice's testimony and lead to an inference that not only has a crime been committed but also that the defendant is implicated in that crime. State v. Spark, 727 S.W.2d 480, 483 (1987). Whether a witness's testimony has been sufficiently corroborated is a function entrusted to the jury as the trier of fact. Id.

1. Official Misconduct

The Defendant contends the State failed to establish that the Defendant used or even possessed a police radio or scanner on the night of the crime because his co-defendants' uncorroborated testimony was the only evidence presented that the Defendant used his police radio. The Defendant also asserts that, as an off duty police officer, his conduct on the night of the crime should be viewed in the same light as the conduct of a private, ordinary citizen. The State asserts that the evidence is more than sufficient to support the jury's verdict.

Our law provides that official misconduct involves a public servant who has "with the intent to obtain a benefit or to harm another, intentionally or knowingly" performed an act that "under color of office or employment . . . exceeds the servant's official power." Tenn. Code Ann. § 39-16-402(a)(2). Tennessee Code Annotated section 39-16-401(3) defines a public servant as "a person elected, selected, appointed, employed, or otherwise designated as one (1) of the following even if the public servant has not yet qualified for office or assumed the duties: (A) An officer, employee, or agent of government"

When the evidence is viewed in a light most favorable to the State, the record shows that the Defendant used equipment obtained via his employment as a Hendersonville police officer to facilitate the perpetration of a crime. The Defendant schemed with Stripling and Dunaway, and the three planned to attack Watts. They planned for Pipkin to push Watts from Watts's front door and Stripling and Dunaway would then beat him up while the Defendant used the Defendant's police radio to ensure that no one called the police. The testimony of Stripling, Dunaway, and Pipkin was

sufficiently corroborated by the Defendant's own statements. Further, on the night of the assault, the police radio was seen in the back of the Defendant's car next to the rods and masks used during the assault. During the assault, the Defendant remained in his car purportedly listening for radio calls. The Defendant maintained at trial that he stayed in the car, but he did not know that the assault and burglary were occurring. The jury rejected this contention. During his conversation with Officer Litton, the Defendant indicated that he carried his radio to use for off duty purposes and that he used his radio on the night of the crime. The Defendant is not entitled to relief on this issue.

Further, the Defendant relies on Jamesena White, et. al. v. Revco Discount Drug Centers, Inc., 33 S.W.3d 713, 720-21 (Tenn. 2003), to support his position that his conduct on the night of the crime should be viewed in the same light as the conduct of a private, ordinary citizen because he was off duty. Such reliance is misplaced. White concerns an employer's liability for torts committed by off duty police officers employed as security guards. Id. at 716-19. White does not address the liability that an off duty police officer incurs when using his police equipment for improper purposes and, therefore, is distinguishable from the case under submission. Id. at 720-21. Tennessee Code Annotated section 39-16-402 makes no distinction between public servants who are on duty or off duty. Further, by way of persuasive authority, the Tennessee Court of Appeals has determined that when an officer intentionally or knowingly uses his office to commit a crime he is acting under the color of his office under Tennessee Code Annotated section 39-16-402. J.W., et. al. v. Maury County, No. M2001-02768-COA-R3-CV, 2003 WL 1018138, at *7 (Tenn. Ct. App., at Nashville, Mar. 11, 2003), *perm. app. denied* (Tenn. Sept. 2, 2003). We are of the opinion that a reasonable person could conclude from the record before us that the Defendant's use of his official equipment to act as a lookout and to monitor police activity during the commission of a crime constituted a violation of Tennessee Code Annotated section 39-16-402. The Defendant is not entitled to relief on this issue.

2. Aggravated Burglary

The Defendant contends that there was insufficient evidence presented at trial to support his conviction for aggravated burglary. Specifically, the Defendant contends that the elements of this offense were not proven beyond a reasonable doubt because none of the parties involved in the assault against Watts intended to commit a felony inside Watts's home and that Watts consented to Dunaway's request to enter his home.

A Defendant commits aggravated burglary if he enters a habitation with intent to commit a felony, theft, or assault and "without the effective consent of the property owner." Tenn. Code Ann. § 39-14-402- 403 (2003). In order to convict a defendant of burglary, the State is not required to offer a witness who saw the defendant break and enter the burglarized premises. Ramsey v. State, 571 S.W.2d 822, 824 (Tenn. 1978); see also State v. Robert Fluellen, No. W2005-01155-CCA-R3-CD, 2006 WL 288105, *4 (Tenn. Crim. App., at Jackson, Dec. 6, 2005), *no Tenn. R. App. P. 11 application filed*. It is within this legal framework that we address the Defendant's contentions.

a. Intent to Commit an Assault

The Defendant contends that his conviction for aggravated burglary should be reversed because there was insufficient proof that Dunaway entered Watts's home with the intent to commit an assault. The statutory language of aggravated burglary requires proof that an individual enters a habitation "without the effective consent of the property owner" with intent to commit a felony, theft or assault. Tenn. Code Ann. § 39-14-402, 403; see also State v. Langford, 994 S.W.2d 126, 128 (Tenn. 1999). When determining whether sufficient evidence supports a defendant's conviction for aggravated burglary, the focus is on the defendant's purpose for entering the dwelling and whether the property owner consented to the entry. Id. At trial, evidence was presented that Dunaway intended to assault Watts when he entered Watts's home after Pipkin had failed to lure Watts outside. While the "original" plan was for Pipkin to lure Watts outside, Dunaway improvised on that plan by entering the home and forcing Watts outside. Further, Dunaway did, in fact, assault Watts by "pushing" him from the home. Therefore, the Defendant is not entitled to relief on this issue.

b. Entry Without Effective Consent

The Defendant argues that his conviction for aggravated burglary should be reversed because Watts testified that he consented to Dunaway's request to enter Watts's home. Again, aggravated burglary requires, in part, proof that an individual enter a habitation without "effective consent." Effective consent is "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion" Tenn. Code Ann. § 39-11-106(a)(i) (2003). Deception, under our statutory definition, occurs when one "creates or reinforces a false impression by words or conduct, including false impressions of fact . . . or other state of mind that the person does not believe to be true" Tenn. Code Ann. § 39-11-106(a)(6)(A)(i). In the case under submission, the Defendant allowed Dunaway to enter his home because of a false impression that Dunaway created, namely that Dunaway had to use the bathroom. Watts did not effectively consent to Dunaway's entry since he allowed Dunaway to enter based upon this false impression. The Defendant is not entitled to relief on this issue.

c. Accomplice Testimony

The Defendant asserts that only accomplice testimony was presented to establish that Dunaway entered Watts's home with the intent to commit an assault. As previously discussed, only slight circumstances are required to corroborate an accomplice's testimony. State v. Griffis, 964 S.W.2d at 589. The corroborating evidence is sufficient if it connects the accused with the crime in question. Id. Dunaway's testimony was corroborated by: testimony from Watts that described how Dunaway deceived him and assaulted him in his home; Swank's testimony about his phone conversation with the victim; Smith's testimony that he saw the Defendant at Grand Stands on the night of the crime; and the Defendant's phone conversation with Officer Litton. In our view, the corroborative evidence introduced at trial sufficiently corroborates the co-defendants' testimony. The State presented sufficient evidence for a jury, by applying the principles of criminal responsibility,

to find the Defendant guilty of aggravated burglary, and the Defendant is not entitled to relief on this

issue.

3. Aggravated Assault

The Defendant asserts that the evidence is insufficient to support his conviction for aggravated assault because the State failed to establish that any of the participants in the crime used a deadly weapon when they beat Watts. Specifically, he contends that the closet rod that Stripling described as thirty inches long and about an inch and a half thick was not a deadly weapon. Further, he asserts that most of the victim's injuries occurred when Stripling punched and kicked Watts in the head, after the stick broke. The State argues that sufficient evidence was presented at trial to establish that Stripling used the rod as a deadly weapon when beating the victim.

The relevant portion of the aggravated assault statute provides that a person commits aggravated assault who "intentionally or knowingly commits an assault" and "uses or displays a deadly weapon." Tenn. Code Ann. § 39-13-102(1)(B) (2003). A person commits assault who: (1) intentionally, knowingly or recklessly causes bodily injury to another; (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. Tenn. Code Ann. § 39-13-101(a). Tennessee Code Annotated section 39-11-106(5)(B) defines deadly weapon as "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Serious bodily injury means bodily injury which involves: "(A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. § 39-11-106(a)(34).

Objects other than traditional weapons may, depending on their use, be deadly. State v. Eaves, 959 S.W.2d 601, 604 (Tenn. Crim. App. 1997). In State v. Flemming, 19 S.W.3d 195, 198 (Tenn. 2000), our Supreme Court concluded that "the increased penalty for use of a deadly weapon is appropriate when an object or instrument other than one's own body is used in the commission of a criminal offense." In State v. Eaves, this Court reasoned that a pen was used as a deadly weapon because the "force of the defendant's assault was sufficient to cause a puncture wound to the hand as the deputy attempted to ward off the blow" and noted that a "pillow, a sock, telephone wire, a hairbrush, and a long-handled flashlight have all been held to constitute deadly weapons because of the manner in which they were used." Eaves, 959 S.W.2d at 604. This Court has also held that stick and martial art fighting sticks, called nunchakus, are considered deadly weapons when used to severely beat a victim. State v. David Lee Dycus, No. 1, 1990 WL 160348, *2 (Tenn. Crim. App., at Jackson, Oct. 24, 1990), *no Tenn. R. App. P. 11 application filed*.

In the present case, the purported deadly weapon was a closet rod approximately thirty inches long and one and a half inches thick. In our view, such a device used in the manner in this case, in the beating the victim, is likely to produce death or cause great bodily harm. Stripling used this closet rod as a deadly weapon when he beat the victim with the rod, and, after the rod was broken by hitting the victim, used the broken rod to beat the victim. The victim suffered a broken hand and a laceration

to his face. Although Stripling resorted to his hands and feet to continue beating Watts after the rod broke, the fact remains that Stripling used the rod as a deadly weapon. Therefore, the State presented sufficient evidence for a jury, by applying the principles of criminal responsibility, to find the Defendant guilty of aggravated assault, and the Defendant is not entitled to relief on this issue.

G. Discovery

The Defendant alleges that the trial court erred when it allowed the State to introduce certain evidence at trial despite the fact that the State failed to comply with the discovery provisions of Tennessee Rule of Criminal Procedure 16(a)(1)(c). Specifically, he contends that the State should not have been allowed to use a police radio at trial and to introduce into evidence photographs of a police walkie-talkie or a stick similar to the one used to beat Watts. The State respectfully disagrees, and further argues that the Defendant did not make an adequate citation to the record showing that the defense objected to the introduction of the stick into evidence, and has therefore waived this issue. The record reflects that the Defendant objected to the introduction of the stick into the evidence, and we will consider this issue on its merits.

According to Tennessee Rule of Criminal Procedure 16 (a)(1)(C):

Upon request of the defendant, the State shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

When arguing that the State has violated Rule 16, a defendant bears the burden of showing "the degree to which the impediments to discovery hindered trial preparation and defense at trial." State v. Thomas Dee Huskey, No. E1999-00438-CCA-R3-CD, 2002 WL 140059, *56 (Tenn. Crim. App., at Knoxville, June 28, 2002), *perm. app. denied* (Tenn. Feb. 18, 2003) (quoting State v. Brown, 836 S.W.2d 530, 548 (Tenn. 1992)). Failure by either party to comply with the discovery rule authorizes the court to fashion an appropriate remedy which "it deems just under the circumstances." Tenn. R. Crim. P. 16(d)(2); see also State v. Smith, 926 S.W.2d 267, 270 (Tenn. Crim. App. 1995). "Thus, it is clear that the court has wide discretion to fashion a remedy that is appropriate for the circumstances of each case and the sanction must fit the circumstances of that case." State v. Dennie Ray Loden, No. 03C01-9311-CR-00380, 1995 WL 23351, at *2 (Tenn. Crim. App., at Knoxville, Jan. 19, 1995), *perm. app. denied* (Tenn. June 12, 1995) (citing State v. James, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984)); see State v. Leon Goins, No. W1999-01681-CCA-R3-CD, 1999 WL 1531111, at *2 (Tenn. Crim. App., at Jackson, Dec. 27, 1999), *perm. app. denied* (Tenn. July 17, 2000).

Despite this broad discretion, evidence should not be excluded except when it is shown that

a party is actually prejudiced by the failure to comply with the discovery order, and the prejudice cannot be otherwise eradicated. State v. Garland, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981). The exclusionary rule should not be invoked merely to punish the State or the defendant for deliberate conduct in failing to comply with the rule. Rather, the contempt powers of the court should be invoked for that purpose. Id. Rules 12 and 16, as well as the other Rules of Criminal Procedure were adopted to promote justice; they should not be employed to frustrate justice by lightly depriving the State or the defendant of competent evidence. Id.

1. Police Radio and Photographs of Walkie-Talkie Radio

The Defendant argues that the trial court abused its discretion by allowing the State to use a police radio at trial and to introduce photographs of a police walkie-talkie into evidence. He argues that the State failed to disclose photographs of a police walkie-talkie and a police radio until three days before trial. He alleges that Detective Ryan of the Hendersonville Police Department informed the Defendant that the only physical evidence in the case was a broken stick. The Defendant argues that he was put on notice that the State was relying on an item that is freely available to the general public, a police scanner, rather than an item reserved for police use, a police radio, which substantially affected his trial preparation, plan, and strategy. The State contends that the Defendant failed to show that the State violated Tennessee Rule of Criminal Procedure 16 because he did not show how the alleged impediments to discovery hindered his trial preparation and defense at trial. The State further argues that the Defendant has failed to show that allowing the use of a police radio at trial and the introduction of photographs of a police walkie-talkie into evidence was an abuse of the trial court's discretion. The trial court found that the Defendant failed to establish that any alleged barriers to discovery effected his trial preparation and that no violation of Tennessee Rule of Criminal Procedure 16 had occurred.

The day before the trial began, the Defendant objected to the State's use at trial of a police radio and photographs of a police walkie-talkie. The Defendant stated that he received notice of the State's intention to use the evidence three days before trial. The Assistant District Attorney General informed the trial court that he could not notify the Defendant about the police radio earlier because he did not know that he would receive the radio. He also informed the trial court that he sent the photographs of the police walkie-talkie to defense counsel the day after he received them. The trial court concluded that the Defendant had not met his burden of showing that the State violated Tennessee Rule of Criminal Procedure 16 because the alleged impediments to discovery affected his trial preparation. The trial court allowed the State to use a police scanner during trial and to introduce the photographs into evidence. The trial court concluded that:

I still don't see how the Defendant is going to be prejudiced. They have alleged a scanning device. This is a scanning device. It is what the General would call a radio. [The Defendant] says that it is not a police scanner that he was apparently visualizing, but, nonetheless, they have – they said in the indictment he was using his police equipment, police scanner, to be a lookout; and the fact that it is this little black device that is a scanner as well as something that through which he can transmit, I just don't

see how that is going to prejudice you at trial.

In our view, the trial court did not abuse its discretion when it concluded that the Defendant failed to meet his burden of showing that the State had violated Tennessee Rule of Criminal Procedure 16. The State was not “within the possession, custody, or control” of the photographs and the police radio until a few days before trial. The State could not disclose items to the Defendant that it had not yet obtained. Furthermore, we can see no prejudice here to the Defendant’s trial preparation efforts. The indictment clearly indicated that the Defendant was being charged for official misconduct by taking advantage of his capacity as a police officer by using a “police scanner” and acting as a lookout. The Defendant has not met his burden to show that the State committed a Tennessee Rule of Criminal Procedure 16 violation because the alleged undue discovery delay prejudiced his trial preparation. Therefore, the trial court did not abuse its discretion when it allowed the State to use a police radio and to introduce photographs of a police walkie-talkie into evidence at trial. The Defendant is not entitled to relief on this issue.

2. Stick as Demonstrative Evidence

The Defendant contends that the trial court erred when it allowed the State to use a stick as demonstrative evidence at trial because the State failed to disclose the stick pursuant to Tennessee Rule of Criminal Procedure 16. He further argues that this alleged failure to disclose substantially prejudiced his case because the stick used as demonstrative evidence was larger than the stick previously described in trial testimony. The trial court concluded that the Defendant failed to establish that a Tennessee Rule of Criminal Procedure 16 had occurred by showing that the alleged impediment to discovery impaired his ability to prepare for trial.

The Defendant objected to the State’s use of the stick as demonstrative evidence at trial because he had not seen the item until the day before trial. The State countered that the rules of discovery do not require that every demonstrative aid be provided to opposing counsel. The State further informed the trial court that, the day before trial, it had the stick cut to the size of the stick that would be described during the trial testimony. The trial court concluded that: “Well, I don’t think the defense is going to be harmed by this. [Stripling] has already described that it was a rod you use in a closet, and I think that for demonstrative purposes the State can use it. So I’ll overrule the objection to its admissibility.”

In our view, the trial court did not abuse its discretion when it concluded that the Defendant failed to meet his burden of showing that the State had violated Tennessee Rule of Criminal Procedure 16. First, we note that the State was not in actual possession of the demonstrative stick until the day before trial. Furthermore, the Defendant failed to show that the State violated Tennessee Rule of Criminal Procedure 16 because he did not show how his preparation for trial would have been different had he earlier received notice of the State’s intention to use the stick at issue. The Defendant claims that the alleged delay in notice of the demonstrative stick prejudiced his trial preparation because he was deprived of an opportunity to test the breaking point of the demonstrative stick. (The demonstrative stick was supposed to simulate the stick that Stripling used to beat Watts).

We note that the Defendant did not raise this argument at trial. The failure to present this argument to the trial court and provide it with an opportunity to remedy the alleged prejudice waives this issue on appeal. See State v. Basil Marceux, No. M2004-02739-CCA-R3-CD, 2005 WL 3100090, *1 (Tenn. Crim. App., at Nashville, Nov. 17, 2005), *perm. app. denied* (Tenn. Mar. 27, 2006) (explaining that a defendant can not properly contest an issue on appeal that he did not raise before the trial court). Second, we find that he also did not include this argument in his motion for a new trial. Therefore, we conclude the Defendant has waived this argument for purposes of appellate review. See Tenn. R. App. P. 3(e). Further, even had he not waived the issue, we conclude that because the Defendant failed to show the trial court how his preparation for trial was prejudiced by the alleged discovery delay, the trial court did not abuse its discretion when it concluded that the Defendant failed to meet his burden showing that the State had violated Tennessee Rule of Criminal Procedure 16. The Defendant is not entitled to relief on this issue.

3. Transcript of Taped Conversation

The Defendant argues that the State violated Tennessee Rule of Criminal Rule 16 because his ability to prepare and present a defense was substantially prejudiced by the State's failure to disclose a transcript of the Defendant's conversation with Officer Litton prior to trial. The trial court found that the Defendant failed to meet his burden of showing that his case was prejudiced by the alleged impediment to discovery. The trial court noted that the Defendant had the tape and "obviously [didn't] make any objection to the tape. I have always assumed that when they give you the tapes they are planning to use the tapes."

At trial, the Defendant objected to the introduction of the transcripts because he did not receive them until the middle of the trial. The State argued that introducing the transcript into evidence was necessary to aid the jury as it listened to the phone conversation between the Defendant and Officer Litton. The trial court allowed a redacted version of the transcript to be admitted into evidence to aid the jury as it listened to the tape recording. The trial court provided the jury with the following instruction: "Please remember that the evidence in the case is the tape itself, not the transcript, and if there are any inconsistencies or discrepancies that you find between them, the best evidence is the tape."

Initially, we note that this Court has previously addressed a case in which a transcript of the tapes that the defendant had previously received were furnished to the Defendant a day prior to their introduction into the evidence. State v. Crabtree, 655 S.W.2d 173, 178 (Tenn. Crim. App. 1983), *superceded, on other grounds, by statute* 1989 Tenn. Pub. Acts Ch. 591 (S.B. 1194), *as recognized in State v. Walker*, 910 S.W.2d 381, 385 (Tenn. 1995). The Court held that nothing in the record showed that the trial court abused its discretion in denying a continuance. *Id.* In the case under submission, the trial court did not abuse its discretion when it allowed the transcripts into evidence. The Defendant failed to show that the State violated Tennessee Rule of Criminal Procedure 16 because he did not explain how entering the transcript into evidence prejudiced his case. The Defendant had an opportunity to review the tapes that contained the same evidence as the transcripts that were entered into evidence. We are unconvinced that non-disclosure of the transcript in this case

caused prejudicial surprise to the Defendant. Additionally, the trial court crafted an appropriate remedy when it instructed the jury to disregard the transcripts if they differed from the content of the tape and redacted several portions of the transcript at the Defendant's request. The Defendant is not entitled to relief on this issue.

H. Irrelevant Evidence

The Defendant contends that the trial court erred when it ruled that certain testimony was irrelevant and inadmissible. The Defendant sought to introduce testimony that described how the co-defendants beat up another individual on the night of the crime after they had separated from the Defendant. The Defendant argues that this ruling denied him the right to present a defense. The State contends that this testimony was irrelevant and therefore inadmissible because the testimony described events that occurred after the crime at issue had already occurred.

During an offer of proof at trial, Pipkin testified that, after he, Dunaway, and the woman who had fought with her husband at Applebee's had parted company with the Defendant and had left Grand Stands, the woman they were with received a phone call and learned that her husband was abusing their baby. They went to this woman's apartment, Dunaway asked the husband why he abused his own daughter, and Dunaway held the husband while a man, who had been drinking with the husband at the apartment, beat up the husband. Pipkin said that someone informed him that the police were coming, and they left this woman's apartment. He testified that the Defendant was not involved with this incident. Dunaway also testified in an offer of proof that he, Pipkin, and the woman went to her apartment after they had left Grand Stands. He testified that Pipkin held the husband while the husband's friend beat up the husband. Dunaway denied ever hitting or holding the husband. The trial court ruled that "what happened from the time they went to Grand Stands and the money was exchanged is not relevant to this case."

In Tennessee, admissibility of evidence is within the sound discretion of the trial judge. State v. Saylor, 117 S.W.3d 239, 247 (Tenn. 2003). The determination of whether proffered evidence is relevant in accordance with Tennessee Rule of Evidence 402 is left to the sound discretion of the trial judge. State v. Kennedy, 7 S.W.3d 58, 68 (Tenn. Crim. App. 1999) (citing State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995)); State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993). In making these decisions, the trial court must consider the questions of fact that the jury will have to consider in determining the accused's guilt as well as other evidence that has been introduced during the course of the trial. State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995). We will only disturb an evidentiary ruling on appeal when it appears that the trial judge arbitrarily exercised his discretion. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989).

Initial questions of admissibility of evidence are governed by Tennessee Rules of Evidence 401 and 403. These rules require that the trial court must first determine whether the proffered evidence is relevant. Pursuant to Rule 401, evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence." See Forbes, 918 S.W.2d at 449. In other words, "evidence

is relevant if it helps the trier of fact resolve an issue of fact.” Neil P. Cohen, et al., *Tennessee Law of Evidence* § 4.01[4], at 4-8 (4th ed. 2000). Relevant evidence may still be inadmissible if its admittance is prohibited by one of the other rules of evidence.

To be relevant under Tennessee Rule of Evidence 401, evidence must tend “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. In a criminal case, evidence that a third party had the motive and opportunity to commit the offense certainly would be relevant. Even if the evidence meets the test of relevance, however, Tennessee Rule of Evidence 403 may still justify exclusion of such evidence. Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403.

As stated above, generally, when we review a claim that calls into question a trial court’s exclusion of evidence on the grounds of irrelevance, we will not disturb the decision of the trial court absent an abuse of discretion. See *State v. Banks*, 564 S.W.2d 947, 949 (Tenn. 1978). In the case under submission, Pipkin’s and Stripling’s conduct after Watts’s beating had occurred are not related to the Defendant’s convictions for official misconduct, or criminal responsibility for aggravated burglary and aggravated assault. Thus, the proffered evidence was irrelevant to the issue before the trial court, and its exclusion was not error. The Defendant is not entitled to relief on this issue.

I. Statements to Police

The Defendant alleges that the trial court erred when it allowed Stripling’s and Dunaway’s entire pre-trial written statements given to the police to be entered into evidence. He further contends that the trial court’s abuse of discretion prejudicially affected his case because the prior statements carried undue weight in the minds of the jury because the statements were allowed into the jury room during deliberations. The State argues that the witnesses’ statements to police were admissible because they were used to rehabilitate the witnesses’ credibility after the witnesses were impeached with the statements.

During cross-examination, Stripling had trouble recalling what he had told Detective Ryan in the statement that he gave to the police about the crime. Defense counsel provided Stripling with a written statement that he had given to Detective Ryan and asked Stripling to read from that statement. Defense counsel questioned Stripling at length over certain inconsistencies between this pre-trial statement and his trial testimony. On redirect examination, the State requested that this statement be introduced into evidence, and defense counsel objected. The trial court held: “I think that the jury is entitled to the entire statement. I will overrule the objection and allow it to be entered as an exhibit and passed to the jury.” Similarly, during Dunaway’s testimony, defense counsel questioned him about a statement that he gave to the police. Dunaway could not recall what he told the police, and defense counsel read from this statement, highlighting inconsistencies between this statement and Dunaway’s trial testimony. On redirect examination, the State requested that the entire

statement be introduced into evidence, over defense counsel's objection, and the trial court allowed the statement into evidence.

Ordinarily, prior consistent statements of a witness are not admissible to bolster the witness's credibility. State v. Braggs, 604 S.W.2d 883, 885 (Tenn. Crim. App. 1980). However, when counsel uses a prior inconsistent statement to cross-examine a witness, and specific questions and answers that are taken out of context "do not convey the true picture of the prior statement alleged to be inconsistent," the statement may be introduced as evidence for the purpose of allowing the statements to be placed in their context." State v. Boyd, 797 S.W.2d at 593-94. "Where specific questions and answers taken out of context do not convey the true picture of the prior statement alleged to be inconsistent, it is unfair to permit reference to isolated, unexplained responses by the witness and there is no error in allowing the statements to be placed in context." Id. When a trial court permits the introduction of a prior consistent statement, a limiting instruction should be given to the jury that the statement is being introduced for the limited purpose of supporting the integrity of the witness or to place the statement of the witness in proper context; and the jury may not consider the content of the statement as substantive evidence to establish the issues which the jury must resolve. Braggs, 604 S.W.2d at 885.

In the case under submission, the Boyd rationale applies because the introduction of the statements that Stripling and Dunaway gave to the police placed the inconsistencies highlighted by the defense into their proper context. See Boyd, 797 S.W.2d at 593-94. The Defendant used these statements to indicate that Dunaway and Stripling were not credible witnesses. For instance, during Stripling's cross-examination, the following dialogue occurred:

Defense Counsel: So when it says, "David hit Danny in the head with the stick," Mr. Pipkin hit Danny in the head with a stick, contrary to what you just testified here in court?

Stripling: I hit him with the stick in the head.

Defense Counsel: I am asking you about Mr. Pipkin, sir.

Stripling: I don't recall.

Defense Counsel: Well, you mentioned earlier that this was closer to the time that it happened. Is this statement accurate?

Stripling: Yes.

Defense Counsel: So when you testified that he hit him below the head here - -

Stripling: I believe that was more accurate, whenever. He hit him below the head.

Defense Counsel: So this wasn't accurate on the statement, but it was accurate what you testified in court?

Stripling: Yes.

This dialogue shows how the defense counsel used the statement that Stripling gave to the police to impeach his trial testimony. In a similar manner, the Defendant's counsel questioned Dunaway about discrepancies between the statement that Dunaway gave to the police and his trial testimony, and Dunaway acknowledged that he may have confused the timing of events during his trial testimony. Therefore, the Defendant used the statements given by these two witnesses to show

that their trial testimony was either based upon faulty recollection or was fabricated. On redirect examination, the State asked Stripling about several details regarding the statement that he gave to the police in order to rehabilitate his testimony, and, through such extensive questioning, the over-all similarities between his trial testimony and the statement that he gave to the police became apparent. Also, Dunaway testified that the general content of his trial testimony and the statement that he gave to the police was the same.

We conclude, as did the trial court, that it was proper for the jury to see the entire statements in order to understand the complete picture that the statements portrayed. Under such circumstances, the entire statements that Stripling and Dunaway gave to the police were relevant to negate the Defendant's attack on their testimony. See Meeks v. State, 867 S.W.2d 361, 374 (Tenn. Crim. App. 1993). Therefore, the trial court properly admitted the statements that the co-defendants gave to the police, and the Defendant is not entitled to relief on this issue. Further, because the statements did not provide information that was not established by other evidence at trial, the trial court's failure to instruct the jury that the statements may only be used to rehabilitate the credibility of the co-defendants and may not be used as substantive evidence was, at most, harmless error.

J. Hearsay

The Defendant contends that the trial court erred by allowing into evidence the following inadmissible hearsay: the statements that Officer Litton made during a phone conversation with the Defendant, the testimony of Karen Ferguson and Tammy Vineyard about what Pipkin and Dunaway told them, and Matt Swank's testimony about his conversation with the victim over the telephone during the burglary. The State contends that none of this testimony was being offered for the truth of the matter asserted and was, therefore, admissible.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible at trial except as provided by the rules or otherwise by law. Tenn. R. Evid. 802. "The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Stout, 46 S.W.3d 689, 697 (Tenn. 2001). As such, an appellate court will not reverse a trial court's ruling regarding the admission or exclusion of hearsay evidence absent a clear showing that it abused its discretion.

In the case under submission, we conclude that the trial court did not abuse its discretion when it found that the statements that Officer Litton made during his phone conversation with the Defendant do not constitute hearsay because they were not offered to establish the truth of the matter asserted. First, we note that the Defendant's statements made during his phone conversation with Officer Litton, although hearsay, are admissible as an admission by a party opponent pursuant to Tennessee Rule of Evidence 803, which permits the admission of an out of court statement offered against the party that is the party's own statement. See Tenn. R. Evid. 803(1.2)

During the recorded phone conversation, Officer Litton told the Defendant that Litton had previously used his radio when he wanted to meet someone to monitor officer activity. He also told the Defendant that a detective had followed one of the suspects who left Watts's house. Officer Litton testified that the story about the detective following the Defendant was not true and that he told that story to the Defendant in order to elicit a response. The Defendant argues that Officer Litton's statements were offered to prove that the Defendant was involved in Watts's assault, which goes to the truth of the allegations in the case under submission. However, the State did not rely on Officer Litton's testimony as substantive evidence. The purpose of Officer Litton's statements was to elicit answers from the Defendant that revealed his involvement in the crime. The trial court told the jury that "anything Officer Litton states is not being offered for the truth but only for the purpose of eliciting a response from the Defendant." The law is settled that jurors are presumed to follow a trial court's instructions. State v. Shaw, 37 S.W.3d 900, 904 (Tenn. 2001).

Further, we conclude that the trial court also did not abuse its discretion when it found that the testimony provided by Ferguson and Fisher was not offered for the truth of the matter asserted and, therefore, does not constitute impermissible hearsay. Ferguson and Fisher both provided testimony that they saw Dunaway and Pipkin at Applebee's, that these men paid for their dinner, and that these men claimed to be under-cover policemen and planned to perform a "drug bust" later that night. This testimony was offered to establish corroboration for the accomplice testimony of Dunaway and Pipkin. Because the testimony provided by Ferguson and Fisher was only offered to corroborate the co-defendant's testimony and not to establish the truth of the matter asserted, we conclude that the trial court did not abuse its discretion.

Similarly, we conclude that the trial court did not abuse its discretion when it found that Swank's testimony was offered for corroborative purposes and not as substantive evidence. Swank testified that Watts told him in a telephone conversation that two strange men were at his door asking for help because they had run out of gas. Swank's testimony was not offered to prove that these assailants asked Watts to help them because they had run out of gas, or that these men had actually run out of gas and asked Watts for assistance. Because Swank's testimony was not offered for the truth of the matter asserted, his statements did not constitute inadmissible hearsay. The trial court did not abuse its discretion when it allowed these statements into evidence. The Defendant is not entitled to relief on this issue.

K. Improper Closing Argument

The Defendant contends that the Assistant District Attorney General improperly implied that Stripling was a truthful witness during his closing argument. The Defendant objected and asserted that the evidence established that Stripling's testimony at trial was inconsistent with the statement that he gave to the police. The portion of the State's closing argument at issue was as follows:

Remember, Mr. Stripling talking about getting arrested. They did a felony takedown. His face was in the grass, knee in his back. He ended up at [the] Hendersonville Police Department. They say, you wanna tell us what happened? Yeah. And he tells

them. You've got a copy of his statement for, these many years ago. What did he tell them? Told them what happened. Told them the same thing that he told you here today.

The Assistant District Attorney General explained that he was characterizing the evidence, and the trial court decided to "let the jury go with their own recollection."

The Tennessee Supreme Court "has long recognized that closing arguments are a valuable privilege that should not be unduly restricted." Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (citing State v. Sutton, 562 S.W.2d 820, 823 (Tenn. 1978)). "Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion." Terry, 46 S.W.3d at 156 (citing Sutton, 562 S.W.2d at 823); see Smith v. State, 527 S.W.2d 737, 739 (Tenn. 1975). This Court has explained that "closing arguments must be temperate, based upon the evidence introduced at trial, relevant to the issues being tried, and not otherwise improper under the facts or law." see State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003) (citing Coker v. State, 911 S.W.2d 357, 368 (Tenn. Crim. App. 1995)).

When an appellate court finds an argument to be improper, "the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the Appellant's detriment." Goltz, 111 S.W.3d at 5 (citing Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965)). In measuring the prejudicial impact of an improper argument, this Court should consider the following factors: "(1) the facts and circumstances of the case; (2) any curative measures undertaken by the court and the prosecutor; (3) the intent of the prosecution; (4) the cumulative effect of the improper conduct and any other errors in the record; and (5) the relative strength or weakness of the case." Goltz, 111 S.W.3d at 5-6 (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); see State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

In Goltz, this Court found that within the closing argument, five general areas of prosecutorial misconduct are recognized:

1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
2. It is unprofessional conduct for the prosecutor to express his [or her] personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. See State v. Thornton, 10 S.W.3d 229, 235 (Tenn. Crim. App. 1999); Lackey v. State, 578 S.W.2d 101, 107 (Tenn. Crim. App. 1978); TENN. CODE OF PROF'L RESPONSIBILITY DR 7-106(c)(4).

3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury. See [State v.]Cauthern, 967 S.W.2d [726,] 737 (1998); State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994).

4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict. See Cauthern, 967 S.W.2d at 737; State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994).

5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

Goltz, 111 S.W.3d at 6 (quoting STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION §§ 5.8-5.9 Commentary (ABA Project on Standards for Criminal Justice, Approved Draft 1971)).

We conclude that the trial court did not abuse its discretion when it concluded that the prosecutor's characterization of Stripling's trial statement as being consistent with his pre-trial statement to the police was not improper. The prosecutor was highlighting the consistencies between Stripling's testimony and the statement just as the defense highlighted the inconsistencies. The prosecutor never commented on the truthfulness of Stripling's testimony, he simply noted that it was consistent with his statement to the police. The prosecutor's statement falls well within the proper latitude allowed in closing argument, and the Defendant is not entitled to relief on this issue.

L. Election of Assaults

The Defendant contends that he was deprived of his constitutional right to a unanimous jury verdict because the trial court failed to require the State to elect, on the aggravated assault count, between an aggravated assault committed by Dunaway and an aggravated assault committed by Stripling. The Defendant reasons that, because both Dunaway and Stripling committed separate assaults by differing means on Watts, the State should have elected the assault for which the Defendant was being held responsible. He contends that, because the State failed to make such an election, he received insufficient notice as to what crime with which he was charged in the indictment. He further argues that the jury's verdict is unclear as to whether they convicted based on the actions of Stripling, Dunaway, or their combined actions. The State contends that the Defendant's arguments are without merit.

Under Tennessee law, a defendant is constitutionally entitled to a unanimous jury verdict. State v. McCary, 119 S.W.3d 226, 241 (Tenn. Crim. App. 2003). However, the right to a jury verdict does not encompass the right to have the jury unanimously agree as to the particular theory of guilt supporting conviction for a single crime. State v. Keen, 31 S.W.3d 196, 208 (Tenn. 2000). In State v. Lemacks, 996 S.W.2d 166 (Tenn. 1999), this Court held that a jury need not be unanimous as between direct criminal liability or criminal responsibility arising out of the same transaction because

criminal responsibility is not a “separate distinct crime.” Id. at 170-71. The right of jury unanimity does not require more than a general verdict in cases where only one offense is at issue based upon a single criminal occurrence. Id. at 171; see also State v. Williams, 920 S.W.2d 247, 257-58 (Tenn. Crim. App. 1995) (holding that requirement of jury unanimity was satisfied even though the form of the jury’s verdict did not indicate whether it found the defendant guilty based upon his criminal responsibility for the conduct of another, or whether the individual jurors were divided on the theory of the defendant’s liability).

In the case under submission, both Dunaway and Stripling beat Watts simultaneously. Their conduct constituted one criminal offense that occurred during one incident. In our view, the jury was not required to clarify for which individual it was holding the Defendant criminally responsible in order to issue a unanimous jury verdict. The Defendant is not entitled to relief on this issue.

M. Sentencing

The Defendant contends that the trial court erred when it sentenced the Defendant by: (1) admitting irrelevant evidence at the sentencing hearing about the Defendant’s prior bad acts; (2) sentencing the Defendant to probation following confinement in violation of Tennessee Code Annotated section 40-35-306 (2003); (3) refusing to consider mitigating factors; (4) imposing a harsher sentence upon the Defendant than the sentences that it imposed upon his co-defendants; and (5) considering enhancement factors contrary to the ruling of Blakely v. Washington, 542 U.S. 296 (2004). The State argues that the record and the law support the trial court’s sentencing decisions.

At sentencing, Carolyn Meager, a State probation officer, testified that the Defendant’s pre-sentence report and the victim impact statements are accurate. Donna Griggs Carfi testified that she is the Defendant’s ex-wife and that the Defendant owes her money and that he is behind on child support payments.

Don Griggs testified that the Defendant married Griggs’s daughter and lived with Griggs for approximately eighteen months. He said that the Defendant worked for the Metro tow-in-lot, which was a part of the police department. He testified that he purchased a pistol from the Defendant that the Defendant said belonged to his friend. Griggs testified that, later, the Defendant told him that he got the gun from the Metro tow-in-lot and that the gun was found underneath the seat of a car that came from a drug dealer. Griggs further testified that the Defendant kept speakers in Griggs’s garage and told Griggs that he received the speakers as a gift from the Metro tow-in-lot.

Dunaway described how the Defendant created a false police report. He said that a woman hit his truck, but he and the woman did not file a police report. He said that the woman could not pay him to fix his truck because she did not have enough money in the bank. He explained that he and the woman needed to generate a police report so that her insurance company would pay to fix his truck. Dunaway testified that he told the Defendant about this situation, and the Defendant created a false police report that documented the accident.

Louis Joseph Gallo, the Defendant's uncle, testified that the Defendant is a helpful individual and described how the Defendant took care of his grandparents before they died. Ricky Rye, the Defendant's father-in-law, and Tenna Rye, the Defendant's mother-in-law, testified that the Defendant is an excellent father. John Dalton, the Defendant's pastor, testified that he spent time counseling the Defendant and that he believes that the Defendant is committed to acting like a good citizen and raising his children. These individuals all agreed to assist in the Defendant's supervision if the Defendant was released back into the community. The Defendant's father, Mike Carfi, testified that the Defendant works hard and that he did not think that his son would repeat the same type of mistakes that led to the charges. He explained that the Defendant was under a lot of stress when he became involved in the incident. Amanda Carfi testified that she is the Defendant's wife and that he goes to work every day and that he spends time with his family in the evenings. She said that he frequently works on Saturdays and Sundays. She testified that neither she nor the Defendant drink alcohol.

The Defendant testified that he made two mistakes in regards to Watts's beating. He said that he should not have associated with the co-defendants and that he should have acted when he had a chance to do something about the incident. He testified that he was afraid and was not thinking clearly. He testified that he thought that he did not have anything to do with Watts's beating.

At the conclusion of the sentencing hearing, the trial court found that the following three enhancement factors applied to the Defendant's case: (1) a victim of the offense was particularly vulnerable because of a prior brain injury, which was applied to the aggravated burglary and aggravated assault convictions; (2) the injuries inflicted upon the victim were particularly great, which was applied to the aggravated burglary and aggravated assault convictions; and (3) the Defendant possessed a deadly weapon during the commission of the offense, which was applied to the aggravated burglary and official misconduct convictions. See Tenn. Code Ann. § 40-35-114 (2003). The trial court sentenced the Defendant, a Range I offender, to the maximum sentence within his range, six years, for his class C felony aggravated burglary conviction. The trial court similarly imposed a six year sentence for the class C felony aggravated assault conviction and the range maximum of two years for the class E felony official misconduct conviction. The trial court then ordered that the Defendant's sentences run concurrently and that he serve one year in a local jail or workhouse, followed by six years of probation.

1. Irrelevant Evidence

The Defendant alleges that the trial court erred when it allowed Dunaway and Don Griggs, the Defendant's former father-in-law, to testify at the sentencing hearing about the Defendant's prior bad acts. The Defendant contends that Griggs's and Dunaway's testimony was not relevant to any enhancement factor and was highly prejudicial. The Defendant further argues that he received no advance notice that the State would offer such testimony, and, therefore, he had no opportunity to investigate this testimony and was deprived of his ability to effectively cross-examine either of the witnesses. The State contends that the trial court acted within its discretion when it admitted such evidence and that the Defendant did not suffer any prejudice from the trial court's decision to admit

the evidence.

We conclude that the trial court did not abuse its discretion when it allowed Griggs's and Dunaway's testimony into the evidence. According to the Criminal Sentencing Reform Act of 1989, the trial court must consider the "evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114." In the case under submission, the State sought the application of the following enhancement factors: (1) the Defendant was a leader in the commission of an offense involving two (2) or more criminal actors; (2) the offense involved more than one victim; (3) a victim of the offense was particularly vulnerable because of age or physical or mental disability; (4) the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great; (5) the Defendant possessed or employed a firearm, explosive device or other deadly weapon during the offense; (6) the Defendant had no hesitation about committing the crime when the risk to human life was high; (7) the Defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense; and (8) the crime was committed under circumstances under which the potential for bodily injury to a victim was great. The trial court may also consider other relevant enhancement factors, including the Defendant's past criminal conduct. See Tenn. Code Ann. § 40-35-114(1). Furthermore, in determining whether to grant probation, the trial court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, including physical and mental condition; and the deterrent effect on the defendant. See State v. Kendrick, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

Because the Defendant requested probation, his social history and background were relevant factors for the trial court to consider in sentencing the Defendant. Therefore, the trial court did not abuse its discretion when it considered Griggs's and Dunaway's testimony, and the Defendant is not entitled to relief on this issue. Further, even if the trial court erred, the error was harmless because the trial court did not apply any enhancement factor based on this testimony.

2. Probation Following Confinement

The Defendant contends that the trial court violated Tennessee Code Annotated section 40-35-306 (2003) when it sentenced the Defendant to six years of probation following his confinement because this sentence exceeded the maximum penalty for his offense. He argues that, under Tennessee Code Annotated section 40-35-306, the maximum period of probation to which he could be sentenced after a twelve month period of confinement is five years. He further contends that this Court should remand his case for re-sentencing. The State contends that, because the provision in Tennessee Code Annotated section 40-35-306 states that the probation may constitute a period of time up to and including the statutory maximum for the class of the conviction offense, the Defendant's sentence is proper because the statutory maximum time for a class C felony conviction is fifteen years.

Tennessee Code Annotated section 40-35-303(c) (2003) governs the eligibility and terms of

sentences involving probation and states that:

If the court determines that a period of probation is appropriate, the court shall sentence the defendant to a specific sentence but shall suspend the execution of all or part thereof and place the defendant on supervised or unsupervised probation either immediately or after a period of confinement for a period of time no less than the minimum sentence allowed under the classification and up to and including the statutory maximum time for the class of the conviction offense.

The Sentencing Commission comments provide that “even though the length of the actual sentence is restricted to that required by the particular range, the judge may fix the length of probation up to the statutory maximum for the class of the offense.” *Id.*, Sentencing Comm’n Cmts. The maximum penalty for the Defendant’s offense class C felony is fifteen years. *See* Tenn. Code Ann. § 40-35-112(c)(3) (2003). The trial court determined that the Defendant was to serve one year in a local jail or workhouse, followed by a probationary period of six years. Because the Defendant’s sentence for incarceration and probation does not exceed the statutory maximum time for the class of his conviction offense, his sentence is appropriate under Tennessee Code Annotated section 40-35-303(c). *See Sterling Pollard v. State*, No. E2005-00888-CCA-R3-PC, 2006 WL 64601, *4 (Tenn. Crim. App., at Knoxville, Jan.12, 2006), *no Tenn. R. App. P. 11 application filed* (holding that the length of the probationary term for a particular offense is the maximum sentence for the offense classification). The Defendant is not entitled to relief on this issue.

3. Mitigating Factors

The Defendant contends that the trial court should have mitigated his sentence by finding that he played a minor role in the commission of the offense under Tennessee Code Annotated section 40-35-113(4). The Defendant also argues that the trial court should have mitigated his sentence under Tennessee Code Annotated section 40-35-113(13) because he had a clean record, turned his life around, and became a productive member of society. The State contends that the trial court’s sentencing decision is entitled to the presumption of correctness and should be affirmed.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. *See* Tenn. Code Ann. § 40-35-401(d) (2003). “The burden of showing that the sentence is improper is upon the appellant.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The presumption of correctness that accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *Ashby*, 823 S.W.2d at 169. In this respect, for the purpose of meaningful appellate review:

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the

mitigating and enhancement factors have been evaluated and balanced in determining the sentence.

Tenn. Code Ann. § 40-35-210(f) (1990); State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). Because the trial court did not adequately articulate how the mitigating and enhancement factors have been evaluated in this case, the standard for our review of the Defendant's sentencing is de novo without a presumption of correctness.

In conducting a de novo review, the following must be considered: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b)-103(5) (2003) and (Supp. 2003); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App.1993).

The Defendant was convicted of two class C felonies and one class E felony. "The presumptive sentence for a Class B, C, D and E felony shall be the minimum sentence in the range if there are no enhancements or mitigating factors." Tenn. Code Ann. § 40-35-210(c). Our sentencing act provides that, procedurally, the trial court is to increase the sentence within the range based on the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Cmts.; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169.

The Defendant argues that the trial court did not adequately consider and weigh certain mitigating factors. For the aggravated assault and aggravated burglary convictions, both class C felony convictions, the record of the sentencing hearing indicates clearly that the trial court enhanced the Defendant's sentence from the minimum of three years to the maximum of six years prior to considering any mitigating factors. Likewise, the Defendant's sentence for official misconduct, a class E felony conviction, was enhanced from the one year minimum to the maximum two-year sentence without any consideration of mitigating factors. The only mention of any mitigating evidence by the trial court occurred after the trial judge had determined and announced the length of the sentences. She then said, "This Court can accept the fact that people make mistakes. [The Defendant] does not have a long prior criminal history, but [the Defendant] won't take responsibility for his mistakes as the other people have, and that is of great concern to this Court."

We cannot determine from the record which mitigating factors, if any, the trial court considered or the weight afforded those mitigating factors. The record clearly shows the trial court's intent to sentence the Defendant to the maximum sentences for his convictions and the application of certain enhancement factors to each conviction. However, the record also contains evidence of several mitigating factors but no indication that these mitigating factors were considered by the trial court. Furthermore, our review reveals that the trial court erred by applying the use of a deadly weapon enhancement factor to the Defendant's convictions for official misconduct and aggravated burglary. For all of these reasons, we conclude that the appropriate remedy in this case is to remand to the trial court for re-sentencing. Upon remand, the trial court is instructed to clearly indicate on the record the enhancing and mitigating factors that are applicable to each conviction, because, as indicated above, all of the statutory enhancing factors considered by the trial court do not apply to all of the sentences.

4. "Harshness" of Defendant's Sentence

The Defendant argues that the trial court improperly imposed a harsher sentence upon him than the sentences imposed upon his co-defendants. He asserts that, by imposing a harsher sentence on the Defendant than on the individuals who physically committed the burglary and the assault on Watts, the trial court in essence punished the Defendant for asserting his constitutional right to a jury trial and thereby denied him due process of law under the Fifth and Fourteenth Amendments of the United States Constitution and article I, sections 8 and 9 of the Tennessee Constitution. The State contends that the trial court's ruling was proper because the trial court rejected the Defendant's claim that he played a minor role in Watts's beating.

The trial court noted that the Defendant's co-defendants received lesser sentences than the one that he received. However, the trial court stated that the co-defendants had all "admitted their responsibility for this crime." Because we are remanding for a new sentencing hearing, the trial court will have the opportunity to fully address this issue at that hearing.

5. Blakely v. Washington

The Defendant argues that the trial court improperly sentenced him in light of the United States Supreme Court decision in Blakely v. Washington, 542 U.S. 296 (2004). He further asserts that any enhancement factors, other than prior convictions or admissions of enhancement factors, must be decided by the jury. The State asserts that the trial court properly imposed the maximum six year sentence. We agree with the State. Recently, our Supreme Court concluded that Blakely neither announces a new rule of constitutional law nor invalidates Tennessee's sentencing scheme, by which a trial court is permitted, rather than required, to enhance a sentence within the statutory range based on its finding of relevant enhancement factors. State v. Gomez, 163 S.W.3d 632 (Tenn. 2005).

N. Correction of the Judgment Forms

As an additional issue, the State contends that the transcript of the sentencing hearing shows that the trial court intended to sentence the Defendant for one year of "jail time" and that the judgment form

should be corrected to reflect that the Defendant will serve his time in the local jail or workhouse rather than in the Department of Correction as stated on the judgment form. Although we agree with the State, because we are remanding for a new sentencing hearing, this issue would appear to be moot.

III. Conclusion

Based upon the aforementioned reasoning and authorities, we affirm the Defendant's convictions. We, however, conclude that the trial court committed reversible error when sentencing the Defendant, and we therefore remand the case for a new sentencing hearing.

ROBERT W. WEDEMEYER, JUDGE